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BY
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“Δεί καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τὸ τ’ὀρθῶς ἔχον ὀφθῇ καὶ τὸ
χρήσιμον.”—ARIST. *Pol.* II. I.

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THE ORGANIZATION OF THE COURTS AND THE JUDICIAL BENCH IN FRANCE.

[Contributed by PROFESSOR J. PERROUD, Faculty of Law,
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Division of Courts.—There are in France numerous classes of courts. In the first place we must distinguish the courts of common law on the one hand, that is to say, those which decide cases involving questions of private law, and the courts of administrative law on the other hand, which determine disputes to which one party is the State or some moral person of the public law. These administrative courts are the prefects' councils (*conseils de préfecture*) and above them the Council of State (*Conseil d'état*).

The courts of common law are themselves divided into civil courts composed of judges properly so-called, these courts being the court of the justice of peace,² the civil tribunals, the courts of appeal and the Court of Cassation, and over against these the courts of experts (*juridictions professionnelles*) which are composed of members elected for a specified time. The courts of experts are themselves of two kinds, the industrial courts (*conseils de prud'hommes*)³ and the commercial courts. The industrial courts decide suits arising out of the contract of employment between manufacturers and traders on the one hand, and their workmen and employees on the other hand. The commercial courts (*tribunaux de commerce*) decide suits arising between traders out of commercial transactions (*actes de commerce*).

The existence of these courts of experts is based upon the idea that the suits which are submitted to them depend generally upon questions of fact, of good faith and of customs which will be probably better appreciated by persons carrying on the same business than

¹ Translated by the Editor.

² It may be mentioned that the French *juges de paix* bear very little resemblance to our justices of the peace.

³ Councils of Experts is perhaps the closest rendering of *Conseils de Prud'hommes*, but I prefer Industrial Courts as being more explanatory and also because the commercial courts are also councils of experts.

by ordinary judges. It was also desired to have for this class of case, a procedure which would be less technical and more summary than that of the civil courts.

Industrial Courts.—The industrial courts were created in 1806 by Napoleon. When he happened to be for a time at Lyons, the silk manufacturers and their workmen requested him to re-establish an ancient local court which decided disputes between employers and workmen and was composed of so-called *conseillers prud'hommes* half of whom were elected by the masters and the other half by the workmen. The idea of referring the solution of disputes arising out of the contract of employment—a class of disputes which always arouses a good deal of feeling—to the interested parties themselves, and of allowing their representatives by regularly working together to become better acquainted and to understand better each other's points of view, appeared to the Emperor a fruitful idea and one calculated to ensure equitable decisions and favourable to social peace. He generalized the institution. Since that time, industrial courts have been created by decree in those towns which have presented a petition for them. The councils include as many industrial sections as there are industries mentioned in the decree. They may comprise in addition a commercial section for litigations between traders of every class and their employees. If in any particular case there should be an equal division of opinion in the council, the president has no casting vote. It is necessary to have recourse to the justice of peace who in this exceptional case presides over the council and secures that there shall be a majority on one side or the other.

The laws organizing the industrial courts have made it the duty of these courts in the first place to endeavour to bring the parties to an amicable agreement, and it is only if the court has not succeeded in this that it is entitled to deliver a judgment. The Court of Cassation has drawn the inference that the omission of this preliminary procedure for conciliation involves the radical and absolute nullity of all the subsequent procedure and consequently of the judgment.

The councillors are elected by those over whom their jurisdiction extends for a period of six years. Half of the council goes out of office every three years.

Commercial Courts.—The commercial courts are composed of judges elected by universal suffrage by the traders domiciled for at least five years in the *arrondissement*. The elections are held every

two years and half the number of members of council are elected each time. The electors vote respectively for assistant judges (*juges suppléants*), ordinary judges and a president. To be eligible as an ordinary judge it is necessary to have been an assistant judge for at least a year, and to be eligible as a president it is necessary to have been an ordinary judge for at least two years. In each class it is possible to be re-elected without a break on two successive occasions.

Commercial courts have been created by decree in those towns in which trade is sufficiently important. In an *arrondissement* in which there is no commercial court, commercial cases are brought in the civil court, but in dealing with them that court will not follow the rules of civil procedure but those of commercial procedure which are simpler.

The commercial courts as an institution are much criticized. It is said, in the first place, that commercial cases frequently raise delicate questions of law, for example, difficult points of partnership law or of private international law and that it is to be presumed that judges who are lawyers by profession would be better qualified to solve these problems. In the second place, it is urged that in practice the commercial courts at present represent in a very imperfect way the original conception of courts composed of experts in the particular trade concerned. It happens frequently, for example, that a case between two metallurgists is heard by three judges, one of whom may be a chemist, the second a stockbroker and the third a wine-merchant. Nay, more, such a situation will not always be a mere accident. Sometimes it is so arranged by the president whose duty it is to distribute the cases among the different sections of the court. The president may be afraid that if he entrusts the case to judges who belong to the same trade as the parties, some of the judges might be suspected of bias, particularly if they happen to belong to a group, association or cartel of which one of the parties only is also a member. And, lastly, the more important of the commercial courts have got into the unfortunate practice of remitting cases in ever-increasing numbers to arbiters named by the court (*arbitres-rapporteurs*). These are private persons charged by the court with the duty of trying to get the parties to come to an agreement and, failing this, of making a complete study of the case both as to fact and law and presenting a report suggesting a decision. No doubt, theoretically, the court is entitled either to approve or to reject this report, but in practice it will almost always be

content to adopt it and to make it the judgment of the court. The result is that the most important cases are decided by a single arbiter who is irresponsible and for whom there is no guarantee other than the fact that he is selected by the court.

For all these reasons it is pretty clear that in practice the commercial courts are not very highly thought of by those who are subject to their jurisdiction. This is shown by the ever-increasing frequency in contracts of an arbitration clause which recent legislation has made lawful in commercial matters.¹

The fact that there are no special commercial courts in countries so commercial in character as England, Germany and Italy may also lead one to think that the existence of such courts in France, explained as it is by a very old tradition, is not perhaps justified by any very evident utility.

Justices of the Peace.—The civil courts, properly so called, are in order of rank the justices of peace,² the civil tribunals, the courts of appeal, and the court of cassation.

The justices of peace are judges who sit singly since the *loi du 29 ventôse, an IX*, which suppressed the assessors who had been given to the *juges de paix* by the *loi des 16-24 août, 1790*. Until quite recently there was a *juge de paix* for every canton. At present, for reasons of economy, in many cases the *juge de paix* has been given jurisdiction over several cantons. The powers of justices of the peace are very various.

1. In the first place they have the duty from which they take their name,³ of bringing about an agreement between parties who propose to bring an action in the civil tribunal. It is only after the *juge de paix* has certified the impossibility of an agreement being reached that the civil tribunal can proceed with the case. As a matter of fact, in the country where the *juge de paix* is as a rule known by the parties and can exercise a real influence upon them, this preliminary procedure of conciliation produces appreciable results. On the other hand, in the towns, where the situation is different, this procedure has proved itself of little use and tends to fall into desuetude. In fact, the law allows it to be dispensed with in cases of urgency if the plaintiff obtains an order to that effect from the president of the civil tribunal. In the large towns, such an

¹ The clause *compromissoire* by which future disputes arising out of the contract are to be submitted to arbitration was formerly illegal in France. It was made legal in commercial matters by the *loi du 31 décembre, 1925*. See, for the history, Dalloz Pér., 1926, 4. 25.

² See note on p. 1.

³ Etymologically, a *juge de paix* is a judge who brings about the *paix de la justice*.

order is asked for and granted as a matter of course. In spite of this, statistics show that the procedure of conciliation stops about a third of the cases which is far from being a negligible proportion.

2. In penal matters the *juge de paix* is the judge of summary offences or contraventions.¹ The decrees for carrying out the *loi du 3 août, 1926*, called the *décrets-lois* Poincaré, have gone so far as to give the *juge de paix* jurisdiction to try a certain number of *délits*. In this court—called the *tribunal de simple police*—the prosecution is conducted by the *commissaire de police* or failing him by the *maire*.

3. In civil matters the *juge de paix* is the judge of petty cases, that is to say those in which the sum at stake is relatively very small. The *décrets-lois* Poincaré have fixed the figures at 1,000 and 3,000 francs respectively. Up to 1,000 francs the *juge de paix* is competent and there is no appeal from his judgment. From 1,000 to 3,000 francs the *juge de paix* is competent but there is an appeal to the civil tribunal. This is at any rate the general principle, but there are numerous exceptions which cannot be explained here. The procedure before the *juge de paix* is as simple and as rapid as possible.

4. Lastly the *juge de paix* has a variety of powers of a non-litigious nature of which we can mention only a few. He summons and presides over family councils ; he takes charge of certain deeds ; he affixes seals after a death ; he legalizes signatures ; he homologates deeds creating a homestead (*bien de famille*)² ; he initials a trader's books,³ etc.

Civil Tribunals.—The civil tribunals which are at the same time criminal courts are the courts of common law. Their decisions are given by three judges in the presence of another judge who represents the *ministère public*, that is to say, the State. In penal matters it is the representative of the *ministère public* who prosecutes ; in civil matters he expresses his opinion on the case as a merely advisory opinion if he chooses to do so, or if the court thinks well to ask him for his opinion, and there are certain cases in which the law requires him to give an opinion. The officials of the *ministère public* are the *Procureur de la République* and his substitutes.⁴

¹Cf. *Code d'Instruction Criminelle*, 137.

² A *bien de famille* is an immoveable of a value not exceeding 8,000 francs which under the *loi du 12 juillet, 1909*, has been made unseizable by creditors. There are a good many formalities and the law, as I am informed, is almost a dead letter. Note by Editor.]

³ A trader's books must be signed on each page by the *juge*, who for this purpose uses what is called his *paraphe*, that is, an abbreviated signature with some special curl or flourish.

⁴ They are commonly called collectively the *Parquet*.

Until the decree of September 1926, there was a civil tribunal for each *arrondissement*. At present there is only one tribunal for a *département* which sits at the chief town of the *département*, but the tribunal of the *département* may have a section in towns within the *département* other than the chief town. The practical effect of this reform has been to abolish about one-third of the tribunals of the *sous-préfectures*.

The personnel of a civil tribunal consists of judges varying in number, of a president, and, in some cases, of vice-presidents. In the large towns the tribunals are in fact divided into sections called chambers. If there are several chambers each of them is presided over by a vice-president, except the first chamber, which is presided over by the president of the tribunal, or failing him, by the senior judge. The most important of the provincial tribunals have six chambers. This is so, for example, at Marseilles and Lyons. The Tribunal de la Seine has twelve chambers, each of them divided into two sections, except the first chamber which is composed of three sections. The president of the tribunal has special duties, of which one of the most important is that of sitting as judge in chambers (*juger les référés*). The procedure here is very summary and the president grants orders of a provisional or interlocutory character which do not affect the ultimate decision of the question at issue.

The judgments of the *juge de paix* and those of the *conseils de prud'hommes* are appealable to the civil tribunal.

The suppression of a large number of the small civil tribunals which was effected by the decree of September 6, 1926, aroused many protests. In order to meet these objections to a certain extent a second decree of November 5, 1926, provides that the *premier président* of the Court of Appeal may decide by ordinance that a judge of the tribunal of the department or of a section of that tribunal, that is to say, a judge of the chief town or of some other town of the department is to visit periodically a town within the jurisdiction which was formerly the seat of a tribunal now suppressed. This visiting judge with the assistance of one of the clerks of the civil tribunal (*greffier*) or of a justice of the peace shall have power to perform any of those judicial duties which can be performed by a single judge, as for example to hold an inquiry into facts (*enquête*) or such duties as are competent to the president of a tribunal, for example, to act as judge in chambers. The judges and other officers of the courts suppressed by the decree of 1926

have been in part attached to the tribunals of the chief towns whose territorial jurisdiction has been enlarged. Another section of the judges whose posts have been suppressed have allowed themselves to be put on pension before the legal time rather than change their place of residence. The great difficulty in finding houses makes changes of residence particularly disagreeable. The remaining judges set free have been attached provisionally to tribunals where there is at present no vacancy and they will be appointed to vacancies as they occur. For the time being, accordingly, the economy brought about by the decree is less than it will be later when all the judges who now swell the numbers of the tribunals beyond the normal are provided with ordinary posts. Even as it is, however, a substantial economy has been effected, and the reform carries with it other advantages as well as that of saving public money. The fact that in future the judges will be brought together in more important tribunals, will make the work more regular, will make it possible to have better libraries and will enable the judges to be better known by the heads of the judicial hierarchy whose business it is to inspect the courts.¹

Courts of Appeal.—The courts of appeal decide appeals from judgments of the civil tribunal in civil or penal matters, from the commercial courts, from orders in chambers pronounced by the president of the civil tribunals, and, lastly, from decisions of arbiters. The personnel of the courts of appeal is composed of a number of *conseillers* which varies in different courts, of a *premier président* and of as many *présidents de chambre* as there are chambers. The *premier président* has a special position. He may preside if he thinks fit over any chamber of the court. In point of fact, he presides as a rule over the first chamber, but without taking part in all the sittings. When there are several chambers there is one which is specially charged with criminal appeals. This rule means that all criminal appeals come before this chamber, but if the chamber after finishing the criminal cases has time at its disposal it will take up civil cases also. There is also in the courts of appeal a chamber called the *chambre des mises en accusation* whose business it is to decide whether an accused person shall be committed for trial to the *cour d'assises*. This chamber, however, has no separate personnel except in Paris. It is composed of a *président de chambre* and of

¹ The civil tribunals are inspected annually by the *premier président* and the *procureur général* of the Court of Appeal, and besides that fact the concentration of the tribunals in the *chefs-lieux* will bring the judges more under the eye of these high officials than when they were scattered about in little towns.

conseillers taken from the other chambers. It is a service additional to the ordinary duties of these magistrates.

The Court of Paris has ten chambers. In the courts of the provinces, the maximum number of chambers is four.

The decisions of the courts of appeal are pronounced as a rule by five judges at least.¹ It is an exception to this rule that the Committal Chamber (*Chambre des mises en accusation*) is composed of three judges only. Appeals against orders in chambers may be heard in the discretion of the court by five judges or by three only. Finally, in a certain number of cases for which the law makes special provision the court must decide in an *audience solennelle*, that is to say, seven judges at least must take part in the decision. This occurs particularly when a court of appeal is called upon to deal with a case which has been remitted to it by the *Cour de Cassation* (*renvoi*) in the manner which will be explained later.

In the Court of Appeal, as in the tribunal, there are officials of the *ministère public*. These are a *procureur général*, who has under him *avocats généraux*, and *substituts du procureur général*.

Court of Cassation.—The Court of Cassation is the highest jurisdiction in France. It succeeded to the ancient *conseil du roi* and, more particularly, to a subdivision of that council which was known as the *conseil des parties*. So much is this the case, that the Court of Cassation is to-day to some extent governed by royal regulations which are held to be still in force.

The organization of the Court of Cassation is dominated by one essential principle, namely, the distinction between fact and law. This court has to decide only questions of law; the facts have been found for it finally by the lower courts. It follows from this principle that the Court of Cassation never pronounces a definitive judgment in a case, because every judgment consists at bottom in applying the law to a given state of facts. The Court of Cassation, not being able to determine the facts, cannot when it quashes a decision (*casser*) substitute a new decision in its place which shall be complete and able to take the place of the decision which has been set aside. The Court of Cassation is bound to remit the case to another court of the same class and of the same rank as that which gave the decision which has been quashed. This second court, called the "court of remit" (*juridiction de renvoi*), is, on the other

¹ The judges in the tribunals are, technically speaking, *juges*, and their decisions are *jugements*. The judges in the courts of appeal and in the Court of Cassation are designated as *conseillers* and the decisions of the court are called *arrêts*.

hand, competent to deliver a judgment on the facts as well as on the law and can therefore render a definitive decision.

The Court of Cassation is composed of three chambers, the *chambre des requêtes*, the *chambre civile* and the *chambre criminelle*. Each of these consists of fifteen *conseillers* and a president of the chamber. There is over and above these a *premier président*. The *arrêt* of each chamber must be delivered by eleven judges at least.

The representatives of the *ministère public* consist of a *procureur général* and of six *avocats généraux*. There are no *substituts* as in the court of appeal.

Penal cases are brought before the criminal chamber which either rejects the petition for review or else quashes the decision and remits the case to a lower court in the manner which has been explained.

Chambre des requêtes.—In civil cases the procedure is considerably more complicated. The petition (*pourvoi*) must in principle, and subject to a very small number of exceptions, be presented in the first place to the *chambre des requêtes*. This chamber designates a *conseiller* to make a report to the chamber expressing his opinion upon the petition. After he has made this report at the hearing of the case the counsel for the plaintiff presents his case and, lastly, the *avocat général* sums up (*conclut*). In the Court of Cassation the *ministère public* always sums up the case and examines the question very fully. The *chambre des requêtes* then comes to a decision, which may be either to reject the petition for leave to appeal (*rejet du pourvoi*) or it may be a decision granting leave (*arrêt d'admission*). The only effect of the decision to grant leave is to allow the civil chamber to be seized of the case. Accordingly the *chambre des requêtes* can never quash a judgment. Its competence is limited to arresting the progress of those petitions for leave which are not sufficiently serious to deserve examination by the civil chamber.

The procedure before the *chambre des requêtes* is of a character quite peculiar to it from the fact that there is no argument against the petition. The defendant in cassation, that is to say, the party holding the decision which is challenged, is not heard. He is not even notified of the petition. This rule is a survival of the old procedure before the *conseil des parties*; it saves time and has no great inconvenience because the defendant will be invited to state his case before the civil chamber.

This chamber also decides the case after having heard the report of a *conseiller*, the arguments of counsel on both sides and the

summing up (*conclusions*) of the *avocat général*. The law has desired that the civil chamber should pronounce its decision without having been subject to any influence. For this reason the judgment of the *chambre des requêtes* granting leave must not state the reasons, this being an exception to the very general rule which requires courts to state their reasons for their decisions (*motifs*). It was feared that an argument in the form of a judgment giving the *motifs*, against the decision which was challenged, would be calculated to incline the civil chamber to quash that decision. For the same reason the *conseiller rapporteur* in the civil chamber, while he explains as fully as possible the question of law involved, must not indicate his personal opinion. His duty is confined to giving an impartial statement of the contentions on both sides and of the arguments which may be urged in favour of each.

Court of Remit.—The decision of the *chambre civile* may be either to reject the petition (*rejeter le pourvoi*) or otherwise to quash the decision attacked and to remit the case to a court designated by the chamber. This court of remit (*juridiction de renvoi*) which is called upon to decide the case again, both as to the facts and as to law, may come to one of three different conclusions: (1) In the first place it may take a different view of the facts from that of the first court. If that is the conclusion its judgment will be pronounced upon different facts from those upon which the Court of Cassation proceeded and accordingly the *arrêt* of the Court of Cassation ceases to have any authority. The situation will be exactly the same as if the court of remit had been the court which had dealt with the case for the first time. This, however, is a situation which very seldom occurs; (2) The court of remit may take the same view of the facts as the first court did but be of opinion that the first court went astray in the law and that the legal doctrine propounded by the Court of Cassation is correct. In that case the court of remit adopts in its judgment the law as laid down by the Court of Cassation and this judgment puts an end to the proceedings. This is by far the most usual solution; (3) Lastly, the court of remit, while agreeing with the first court as to the facts as in the preceding hypothesis, may agree with that court also upon the question of law. It comes in that case to the conclusion that the judgment of the first court was right and that the Court of Cassation did wrong to quash it. In such a case it is said that the court of remit “resists the jurisprudence” of the Court of Cassation. Such resistance, which is, however, pretty rare, indicates that the

legal question is really very difficult and one which requires a particularly profound examination. Accordingly, if a new petition is presented against the decision of the court of remit, this petition will be presented to the full Court of Cassation in *audience solennelle*, that is to say, the three chambers sitting together. Seeing that each chamber must have eleven members, the *chambres réunies* must have at least thirty-three judges, three of whom are *présidents de chambre* and in addition the *premier président*.

The judgment of the *chambres réunies* if it quashes the decision of the court of remit must remit the case to a second court of remit. But this second court of remit is bound by the decision of the *chambres réunies*. It is no longer free to discuss the view of the law laid down by the supreme court. Cases do occur in which the *chambres réunies* hold that the *chambre civile* has been wrong in its law, but such cases are not very common.

This review of the various civil jurisdictions in France brings out the fact that these jurisdictions are competent to deal both with civil and with criminal cases. The *juge de paix* decides both the small civil cases and also contraventions; the civil tribunals are at the same time correctional tribunals. The courts of appeal and the Court of Cassation hold sittings for civil cases and for criminal cases. This solution has frequently been criticized. It has been pointed out that the qualities which are desirable in a judge in criminal matters are very different from those required of the judge in civil cases. But so far these considerations have not led to any modification of the traditions of the French law. All that they have brought about is one very slight reform, namely, that by the *loi du 12 juillet, 1905*, two posts of *juge de paix* were created in Paris, the holders of which should be occupied only with contraventions.

Personnel of the Courts.—Having now studied the different courts, it remains to examine the manner in which they are recruited and the position of their personnel. This examination will be restricted to the judges properly so called and will leave completely out of account the elected judges or arbiters, that is to say, the *conseillers prud'-hommes* and the members of the commercial tribunals which have been referred to above. The *juges de paix* will be dealt with separately later.

Recruiting of Judges.—The manner in which the judges are recruited is a question of the very greatest importance. It affects all the citizens for none of them is secure against a lawsuit, and the

more or less satisfactory way in which this problem is solved is an index of the state of political education in a country. The problem is very difficult and that for two reasons. The first is, that it is necessary to keep in view requirements which are contradictory. For, in fact, the ideal judge must be enlightened and honest and at the same time independent of the executive. Now, there are only two possible ways of appointing him : either he must be nominated by the Government, a method which affords every possibility of selecting candidates who are honest and capable, but which greatly restricts their independence, or on the other hand the judge may be elected, and, by this method, though we may insure his independence, we shall run the risk of sacrificing the requirements of honesty and capacity. The second reason which makes it difficult to organize the recruiting of judges is that this question is bound up indissolubly with another question, namely, that of promotion. If promotion is not governed by fixed rules, and if considerations other than professional merit may come in, able judges will become discouraged, or rather, men of ability will not even attempt to enter on a career which does not assure them of such a future as they have a right to expect.

In the history of the French law, many systems have been tried. Under the old law, judicial posts were acquired by purchase as are to-day the ministerial posts of the *avoués* and the notaries. During the Revolution, judges were elected by universal suffrage and the result was deplorable. From the time of Napoleon, judges have been nominated by the Government, but it has been sought to ensure their independence by giving them security of tenure as we shall see later. During the whole course of the nineteenth century, the admission to the bench was by the arbitrary choice of the Minister of Justice. All that the law required was that candidates should hold the diploma of a licentiate in law, which requires only three years' legal study, and should have served a *stage* of two years as an advocate, which in default of any supervision might amount to nothing in the way of practical utility. In 1876, however, M. Dufaure, as Minister of Justice, established a competitive examination for candidates for the bench. This excellent measure ensured professional capacity and did away with the arbitrary choice of the Government. This examination was held only once as the fall of the Minister carried with it the abolition of this reform. The candidates who were appointed as a result of the examination of 1876 have most of them had a very brilliant career.

At the end of the nineteenth century, public opinion protested against the Government having the absolute right to choose judges according to its own free will, and one writer remarked that such a system existed in Europe only in France and in Turkey. Finally, the financial law of April 17, 1906, announced that within three months a regulation would be issued which would fix what professional qualifications were to be required of candidates for judicial posts and would at the same time lay down a programme for promotion for judges. The legislator had then clearly recognized the necessary connexion between the question of recruitment and that of promotion. The regulation appeared a little after the time stated—*décret du 18 août, 1906*. Other decrees followed and then came the *loi du 28 avril, 1919*, which has itself been followed by later decrees.

All these texts adopt the same principle. On the one hand, the bench is to be open to young men who desire to follow that career, and, on the other hand, it is to be open also to certain older men whose antecedents justify their selection. The proportion of places reserved for the young men, which was at first fixed at three-quarters of the places vacant, is now five-sixths.

In order to be nominated at the bottom of the scale the candidate must have a diploma either as a licentiate or as a doctor of law. A doctor in law who has taken that degree with juridical science as his special subject is allowed an advantage of a certain number of points in the examination for admittance.

Besides the diploma the candidate must have completed a *stage* of one year as a supplementary assistant either in the Ministry or in a *parquet*, or else, a *stage* of two years in the office of an *avoué*. The secretaries of the association of the *avocats stagiaires* of Paris and those candidates who have gained a prize in one of the law faculties of the State universities are excused from the *stage*.

Those candidates who produce the necessary diploma and the evidence of completion of the *stage* are allowed to present themselves for an examination which is held in each year. The examining board draws up a list in order of merit of the candidates who succeed and another list comprising those candidates who have passed the examination previously, but have not yet been nominated to a post. It is only those young men whose names appear upon one of these lists who can be nominated to a post in a *tribunal civil*.

Certain persons may be appointed directly to any judicial office with the exception of the Court of Cassation. These are members

of the *Conseil d'état*, professors and *agrégés* of faculties of law, lecturers in faculties of law after three years' service, prefects after three years' service, sub-prefects after six years' service, officials of the Ministry of Justice of the rank of *rédauteur* and upwards after two years' service, advocates after ten years' actual practice of their profession, *juges de paix*, ex-avoués and ex-judges. As regards the last, however, if they had not occupied their former position more than one year, or if two years have not elapsed since they were in office, they can only be put back to a post equivalent to that which they had given up.

The following may be nominated directly to the Court of Cassation : *conseillers d'état*, professors of a faculty of law, after ten years' service, advocates attached to the Court of Cassation who are or have been members of the *conseil de l'ordre*, advocates in general being *ex-bâtonniers* after at least twenty years of practice at the bar.

Promotion of Judges.—After the recruitment of judges we must deal with their promotion. The laws above mentioned have laid down a scheme of promotion and have provided that no one is to be nominated to a higher post except according to the scheme. The way in which the system works is as follows. Every year the two heads of the court, that is to say, the *premier président* for the ordinary judges, and the *procureur général* for the *Parquet*, prepare a list showing their proposals for promotion. These lists are sent to the Minister who collects them together and transmits them to a commission consisting of the *premier président* and the *procureur général* of the Court of Cassation, of four *conseillers* of the Court of Cassation designated by decree and of the members of the *conseil d'administration* of the Ministry of Justice. This commission prepares the annual scheme of promotion which is published in the official journal. Any judge who finds that his name does not appear on the list may demand to be heard by the *commission de classement*.

In principle, no person can be placed on the list of promotion unless he has served for two years in the post which he holds or in an equivalent post. A decree of 21 *juillet*, 1927, gives a list indicating what posts are equivalent to one another. In principle also, a judge cannot be promoted to a post which is more than a single step higher in the hierarchy than his present post.

Until the decree of 21 *juillet*, 1927,¹ the fact that a judge's name appeared in the scheme of promotion gave him no guarantee because the Minister was quite free to choose among all the names on the list. Art. 19 of this decree provides that one-quarter of the posts

¹ Dalloz, 1928, 4. 343.

shall be reserved for those judges whose names have been longest on the list.

As for the highest posts the Minister has freedom of choice. There is no scheme of promotion for membership of the Court of Cassation or for the posts of *premier président*, or *procureur général* of a court of appeal, or president of a tribunal, or *procureur de la République à la Seine*.

Judges enjoy certain prerogatives ; they are excused from other public duties, for example, from serving on a jury at the assize courts. They enjoy the privilege of jurisdiction given to them by Art. 479 of the *Code d'Instruction Criminelle*, that is to say, they can only be prosecuted criminally before a court of appeal and, as regards them, the functions of the *juge d'instruction* can be exercised only by the *premier président* of the court of appeal.

Security of Tenure.—But their most important privilege, that of security of tenure (*inamovibilité*), belongs only to the judges who are not attached to the *Parquet*. This privilege consists in the fact that the judge cannot be removed from office or even sent to another place against his will by the mere decision of the Ministry. For every exercise of discipline more severe than removal from one place to another, the *garde des sceaux* (i.e. the Minister of Justice) is bound to consult the superior council of the bench which is nothing else than the Court of Cassation *toutes chambres réunies*. The consent of this superior council is necessary before a judge can be suspended from office or dismissed, and in view of the *esprit de corps* which exists it will be very difficult to obtain this concession. As regards removal from one place to another, the Minister of Justice, instead of consulting the superior council of the bench, may call together a smaller commission consisting of the *premier président* of the Court of Cassation and of six of the *conseillers* of that court. The judge's security of tenure is, moreover, not to be considered as a personal privilege which he enjoys but as a protection for litigants, inasmuch as it tends to secure the independence of the judge. The idea is already indicated in the letters patent of Louis XI of October 12, 1467. But the independence of judges is not ensured sufficiently by the mere fact that they cannot be removed from office. Besides this it is necessary that there should be a regular system of promotion.

The age limit of judges is in general seventy years. The *conseillers* and presidents in the Court of Cassation may remain in office up to the age of seventy-five. The decree of March 1, 1852, which fixed these limits, provided, however, that the Government

may, if it thinks fit, retain the services of a judge who has passed the age limit. This law was a regrettable violation of the principle of security of tenure, for a judge whose services have been retained in this way was exposed at any moment to the risk of losing his position at the pleasure of the Minister. The *loi du 27 juillet, 1916*, put an end to this excessive power of the Minister. There is now no dispensation from the age limit. Nay, further, the anxiety to respect the rule of security of tenure has led the courts in their decisions to place judges in a special position as regards being put on pension. According to the general law, an official who reaches the age limit remains in office until the amount of his pension has been determined by the administration. This rule, it has been held, does not apply to a judge. This has been so decided by an *arrêt* of the *conseil d'état* upon the ground that the administration must not have the right, according as it uses less or more dispatch in preparing the *règlements* fixing his pension, of keeping a judge in office for a longer or shorter period.¹

Juges de Paix.—The position of the *juges de paix* is different from that of other judges. The conditions of their nomination have been considerably modified. Until recently, the following persons might be appointed *juges de paix*: firstly, *ex-juges de paix*, secondly, specially qualified persons, that is, licentiates in law or persons having studied law for two years and lastly, candidates without any legal diploma but who had held certain offices, such as the following: member of a commercial court, bailiff, assistant clerk of court, mayor, deputy-mayor, or *conseiller général* for ten years, or senior clerk to an *avoué* or a notary in the chief town of an *arrondissement* for five years. These candidates without any diploma were obliged before they could be nominated to pass an examination from which, however, *ex-juges de paix* and such persons as were qualified for nomination to a civil tribunal were excused. At the present time, after the decree of 5 novembre, 1926, the conditions have been changed, but it is understood that as a transitory measure, those candidates who had passed the examination under the former régime will continue to be eligible for nomination as *juges de paix*. In future, in order to be appointed as a *juge de paix*, a candidate must possess, (1) the *licence en droit*, (2) have completed a *stage* of two years either at the bar or in the office of a court (*greffe*), or in the office of a notary or of a bailiff (*huissier*), and (3) he must pass a professional examination.

The requirement of the licence is in no way excessive for a judge

¹ 25 novembre, 1921: Dalloz, 1922, 3. 25.

who is to sit alone and to whom the legislator tends to entrust matters of greater and greater importance. It will also make it more easy for *juges de paix* to be transferred to the tribunals.

Promotion of Juges de Paix.—The promotion of *juges de paix* takes place not so much by removal from one place to another as by a change in his class and, in consequence, in his remuneration. He is at the present time subject to a scheme of promotion drawn up by a commission composed of certain superior judges and of three *juges de paix* nominated each year by decree. A *juge de paix* must have been four years in office before he can be promoted.

Security of Tenure.—Up to 1905, the *juges de paix* were exposed to the risk of being dismissed or removed from one place to another at the arbitrary will of the Government. This put them at the mercy of political influence. The *loi du 12 juillet, 1905*, Art. 21, has provided that *juges de paix* cannot be dismissed or reduced to a lower judicial class except upon the recommendation of a commission nominated by the Minister of Justice composed of the *procureur général* in the Court of Cassation, of three *conseillers* of that court and of three *directeurs* of the Ministry of Justice, and only after having been heard in their own defence if they claim that right.

This law clearly marks an advance, but it does not give to a *juge de paix* the same degree of security of tenure as is enjoyed by the other judges. The commission comprises only three judges who have security of tenure and even these are chosen at the discretion of the Minister.

Judicial Salaries.¹—In order to have a complete view of the judicial

¹ It is interesting to compare the number of judges and the scale of remuneration in France and in Great Britain respectively, two countries of which the population is roughly speaking about the same.

In France, the number of judges after the decree of September 6, 1926, which suppressed 392 posts is as follows :—

Cour de Cassation, 6 ; Cours d'appel, 82 ; Tribunaux civils, 1432 ; to these must be added the members of the tribunaux de commerce and of the conseils de prud'-hommes who are unpaid.

In England, the number of judges and their salaries are as follows :—

Lord Chancellor, £10,000 ; Lord Chief Justice, £8,000 ; Lords of Appeal in Ordinary (6), £6,000 each ; Master of the Rolls, £6,000 ; Lords Justices (5), £5,000 each ; High Court, Chancery Division (6), £5,000 each ; King's Bench Division (17), £5,000 each ; Probate Division (3), £5,000 each ; County Court judges (59), £1,500 each, plus a bonus which is now about £200 ; Metropolitan Magistrates, Chief Magistrate, £1,800, Magistrates (24), £1,500 each, and 1, £1,000 ; Recorder of London, £4,000 ; Chairman and Deputy-Chairman, County of London Sessions, £2,500 and £2,000 respectively ; Stipendiary Magistrates (18), varying salaries ; Masters of Supreme Court (6), £1,500 to £1,200.

In Scotland :—Court of Session, Lord President, £5,000 ; Lord Justice-Clerk, £4,800 ; Lords of Session (11), £3,600 each ; Sheriff of Edinburgh, £1,800 Sheriff

bench in France, it is perhaps not without interest to give the scale of judicial salaries. This will be found in the *tableau* attached to the *décret du 10 janvier, 1927*.

I.—*Court of Cassation.*

	francs
Premier président	80,000 (about £641)
Président de chambre	75,000
Conseillers	51,000
Procureur général	80,000
Avocats généraux	54,000

II.—*Cours d'Appel.*

(a) *Cour d'appel de Paris.*

Premier président	75,000
Présidents de chambre	43,000
Vice-présidents de chambre	41,000
Conseillers	36,000
Procureur général	75,000
Avocats généraux	41,000
Substituts généraux	36,000

(b) *Autres cours d'appel.*

Premier président	54,000
Présidents de chambre	35,000
Conseillers	28,000
Procureurs généraux	54,000
Avocats généraux	29,000
Substituts généraux	26,000

III.—*Tribunaux de première instance.*

Here, as in the *cours d'appel*, the salaries in Paris are considerably higher than those elsewhere. The *président du tribunal de la Seine* receives 60,000 francs, whereas a president of the first class in a provincial tribunal has 35,000 francs. A *juge du tribunal de la Seine* has 29,000 francs and a judge of the first class elsewhere, 21,000 francs. The salary of a judge of the third class in the provinces is 15,000 francs.

IV.—*Juges de paix.*

The salaries range from 27,000 francs for a *juge de paix hors classe* to 12,500 francs for a *juge de paix* of the fourth class.

of Lanark, £2,000; Sheriffs-Substitute (58), from £1,400 to £700. I have not included the Recorders in England (except the Recorder of London) or the Sheriffs-Principal in Scotland (except the Sheriffs of Edinburgh and Lanark) because their duties do not occupy their whole time and are not incompatible with practice at the Bar. For the same reason I do not include the judges of the Liverpool Court of Passage, or the judges of the local or borough courts of record. The Vice-Chancellor of the County Palatine of Lancaster is a whole-time judge. There are probably some omissions in the English list but they will not seriously affect the total. According to my calculation, there are in Great Britain 224 paid judges as against 1,520 in France. This great disproportion of numbers may be to some extent explained, (1) by the great amount of work done by unpaid Justices of the Peace, (2) by the fact that English judges of first instance sit alone, and (3) by the greater frequency of arbitrations in England. [Note by Editor.]

THE GERMAN DRAFT PENAL CODE AND ITS PLACE IN THE HISTORY OF PENAL LAW.

[Contributed by PROFESSOR H. B. GERLAND, *University of Jena.*]¹

To comprehend properly the Draft Penal Code which is at present before the *Reichstag* we must examine its provisions in the light of the history of that branch of law. We must trace the movement for its reform during the last ten years, and we cannot understand this movement itself without taking into consideration the history of the Penal Code of 1870 which is now in force. The dominant note of that history is the conflict between the eighteenth-century doctrine of the Administrative State (*Verwaltungsstaat*) and the nineteenth-century doctrine of the Constitutional State (*Rechtsstaat*).

The Penal Code of 1870 abolished, broadly speaking, all the Penal Codes of the separate States which were at that time united to form the German *Reich*. Among these State codes the most important—owing to the size of the country—was the Prussian Code of 1851. This code was taken as a basis for the preparation of the draft code for the *Reich*, and it is no great exaggeration to say that the German Penal Code of 1870 is merely a revision of the Prussian Penal Code of 1851. The Prussian Code was based essentially upon French law, in the first place, because the French legislation of Napoleon at that time enjoyed everywhere a very high reputation, and in the second place, on account of the decisive influence exerted by the jurists of the Rhine provinces in whose territory French law had remained in force ever since the French occupation. In this way the German Penal Code is derived indirectly from French law and the effect of the legislation of 1870 was to extend to the whole *Reich* that "reception" of French penal law which had been brought about in Prussia as early as 1851.

The French origin of the German Penal Code is manifest throughout. It may not be so obvious in the provisions of detail, but it shows itself clearly in the general principles which govern the whole Code.

¹ Translated by the Editor.

It is important, therefore, to grasp these general principles in order to understand and to estimate the German criminal law of to-day and to form a just conception of it. To do so we must realize the influence of Napoleon's legislation on the development of continental law and particularly of the law of Western and Central Europe. And the point to start with is that the main object of the French legislation at the beginning of the nineteenth century was to put into the form of positive laws those fundamental ideas of the eighteenth century which had been developed theoretically under the conception of the Law of Nature. It was the transition from the period of criticism and of Natural Law to the period of fixed rules of positive law. The eighteenth century was dominated by criticism, the nineteenth century was a time of positive legislation.

The Critical Philosophy of law, when occupied with problems of positive fact, approaches in its attitude to that of the Historical School; indeed it may be compared, as a mental attitude, to Darwinism, which itself, in final analysis, may be regarded as the application to biology of the methods of the historian.

The law of the French *Code Pénal* stands in sharp contrast with the penal law of the *ancien régime*, i.e. of the period before the French Revolution. The essential reason for this contrast is that the *Code Pénal* gives a different answer to the question which underlies all constitutional law, namely, what is the relation between the individual and the society or the State. Before 1789 we have the Absolute State, which, even in its later form of an enlightened despotism, remains what it had been from the first, a pure Administrative State (*Verwaltungsstaat*) in which the restraints imposed by law upon arbitrary power are entirely inadequate. After 1789 comes a great movement for emancipation. The arbitrary power of the State is attacked first by theoretical and critical writers, and afterwards by politicians who introduce changes. This movement seeks to delimit the sphere within which the individual can move without interference by the State, and it culminates in the claim for certain inalienable "rights of man." The victory of Natural Law was brought about at the French Revolution by a struggle similar to that which had been successfully waged in England a century earlier. It is clear that, so far as this matter is concerned, the French Revolution stands for a victorious struggle on the part of the individual citizen for freedom from State control. The opposing views cannot be put more pointedly than by placing

side by side two familiar phrases—the phrase of Louis XIV, *l'État c'est moi*, which, expressed as it is in terms of purely private law, denies in the clearest way the freedom of the individual, and over against this the phrase of the French Revolution, *l'État c'est le tiers état, c'est le peuple*. In this way the Administrative State was replaced by the Constitutional State, the essence of which is the recognition of a sphere of action within which the individual is entirely free from interference by the State. An invasion of this sphere by the State is, broadly speaking, permitted only when there is some text of law which expressly allows it. Paradoxical as it may sound, the decisive question in French penal law is not a question of criminal law at all. What is decisive is that which lies behind the penal law, namely, the constitutional or political doctrine with all the consequences which flow from it. It is the protection of the individual against the arbitrary power of the State and not the protection of the State, or in other words, of the community, against arbitrary conduct of the individual in the form of crime which is the order of the day. This is the explanation of the phrase which dominated the present Penal Code, *Nulla pœna sine lege*, a rule the aim of which was to exclude all customary law from the Penal Code. As to every particular case in which there is to be criminal liability minute provisions determine what is to amount to the crime in question, and the punishments are fixed negatively and positively as narrowly as possible. So far as may be the discretionary power of the judge is eliminated, and where some discretion has to be left it is reduced to a minimum. Such a system of law will have nothing to do with administrative measures aimed against criminals or persons dangerous or injurious to the State. We find throughout a desire to secure an administration of criminal law which shall be as uniform as possible and shall suffer as little as may be from the fact that different Courts are liable to take different views.

The Penal Code consists of a series of rules based on experience which are to be applied to crimes each of which is of a particular type. These rules may well be too inelastic, and this inflexibility may render them ill-fitted to deal with the infinite variety of circumstances which occur in life. But, on the other hand, such rules are well adapted to perform that function which is most important of all, even although it is purely negative, namely, to protect the citizen under all circumstances against the arbitrary authority of the State exercised through its various organs and officials.

No doubt in the preparation of the Penal Code certain special conceptions and ideas had an influence in shaping particular provisions. But if we look at the Penal Code as representing a stage in the historical development of criminal law, its significance is that it is the champion of the idea of the Constitutional State. What is essential about it is that it abolishes the penal law of the Administrative State and puts in its place the penal law of the Constitutional State.

But if the German Penal Code is derived from the French *Code Pénal* by way of the Prussian Code it was, nevertheless, made at a time when the science of the criminalists had got beyond the strictly defined "typical" crimes of the *Code Pénal*. That there had been progress in this regard is not surprising. The one-sided political theory which thought only of the protection of the individual was already antiquated. More and more, a new view was gaining ground, which, in direct opposition to the eighteenth-century view, did not pay regard first and foremost to protecting the individual and to his *rights*, but put in the forefront the *duties* of the citizen, and in so doing recognized his subordination to the State and emphasized from the point of view of society the fact that the individual must be regarded in his connexion with the State. The liberalism of the first half of the nineteenth century became hardened into the Manchester doctrine of *laissez-faire, laissez-aller*. This brought about a reaction in the form of a complete change in the political theory. According to the new theory we must not consider the individual by himself; we must consider him as bound up with the State, or, if we choose to say so, with the community, and owing duties to it.

This theory found its most thorough-going expression in Marxism, whose most logical champions regarded the individual *only* as a member of society, as a part of a whole. Instead of breaking up society into its atoms as had been done in the eighteenth century by the advocates of Natural Law, the new school socialized the individual. This is bound to bring in its turn a reaction in the other direction.¹ In Germany the new conception showed itself in a conspicuous manner in Bismarck's social legislation. In these

¹ This theory is carried to the extreme in the experiments of Bolshevik pedagogy which aim at converting the "individual man" into the "collective man." It is clear that such absurdities can only lead to the complete debasement of education. The "collective man" can never be anything other than the "uniform man," since in will and feeling he must always remain what nature made him, namely, an individual.

laws a quite different view is taken of the relation between the individual and the State from that of the German Penal Code, which, as we have seen, was still dominated by the old principles of the penal law of the Constitutional State.

All penal law is secondary or "adjective" law. It exists for the protection of property and legal rights which are not created by it, and, as opposed to the substantive law which determines what are legal rights, the penal law is of a secondary character. This explains the fact that developments which at a particular period fundamentally modify the substantive law penetrate only at a later time and as a rule rather slowly into the secondary law and specially into the criminal law. Accordingly, it is not to be wondered at that it was not until late in the day, comparatively speaking, that this great struggle between individualism and socialism (using that word in a non-political sense), that is between the freedom of the individual on the one hand, and his solidarity with the State on the other hand, was in Germany carried into the field of criminal law. In fact it would not be too much to say that the new conception did not gain the day until the revolution of our own day had laid down the foundations upon which a new penal law might be based. This revolution consisted, as we have seen, in the realization of the solidarity of the individual with the State, an idea in frank opposition to that which prevailed at the French Revolution in the eighteenth century.

If we compare the draft penal codes which were prepared in Germany before 1914 with the drafts after 1918, it is easy to see that the latter differ from the former not only in details but in the general conception of the matter.

Among theoretical writers, it is true, there set in early the movement for reform which, apparently, is now on the eve of being brought to a successful conclusion. And it should be pointed out that the movement was not confined to Germany, a fact which will seem natural enough from what has been already said. It was from the first a *European* movement and it made itself evident in Italy, Belgium, Holland, France, Austria and elsewhere, as well as in Germany. From the beginning it was led by the well-known Berlin criminalist, Franz von Liszt, a leader whose influence was by no means confined to his own country, and a man who must be regarded as one of the most original and conspicuous personalities in the field of criminal law. In his fight against tradition Liszt went at once to the heart of the problem. He accused the existing

law of being so much engrossed with rigid conceptions as to appropriate punishments that it had completely lost sight of the main object of any system of criminal law. This was the protection of society. It was with this purpose in view that every criminal code ought to be shaped and it was this purpose alone which could give value to it as a function of society. No criminal law could be tolerated unless it succeeded at least fairly well in protecting society. According to Liszt the law of the German Penal Code was obviously bad because it did not succeed in protecting society. This was clear from the progressive increase of crime evidenced by the statistics. Liszt reproached the present law with attaching weight only to the external criminal act. Starting from an idea of abstract justice, the law laid down narrow and strictly defined limits in regard to sentences. The hands of the judge were tied and he had not the freedom of action necessary to enable him to fit the punishment to the particular case. Accordingly Liszt starts with the proposition that what is to be punished is not the crime, but the criminal. Instead of trying to reduce crimes to types and to treat them objectively as the Code does, Liszt argued that the judge ought to have the widest possible discretion. He ought to be allowed to pronounce an indeterminate sentence of imprisonment which left it to the administrative authority to fix the nature and the duration of the imprisonment, and so on. Moreover—and this was another decisive point made by Liszt—the great object of penal law, namely, to prevent crime, cannot be attained merely by inflicting punishment. In a modern society we find large numbers of injurious characters upon whom punishment has ceased to make any impression. They are indeed so constituted that it cannot make an impression. To this class belong those of the mentally diseased who are dangerous to the community, habitual drunkards and cocaine takers and those habitual criminals to whom breaches of the criminal law, that is of the social order, have become such a confirmed habit that fear even of the most severe punishments cannot deter them.

But if punishments are ineffectual the interests of society demand that the State should defend itself against these abnormal growths in some other way. Nay, so far as is possible, it must prevent them, and to this end it must supplement the criminal law, in the ordinary sense of the term, by a series of administrative provisions which may be classed together as preventive measures. It is under these powers that provision can be made for the compulsory

treatment of drunkards, the compulsory seclusion of such insane persons as are dangerous to the public, and more particularly, for the preventive restraint of the habitual criminal. And it is obvious that measures of this kind have nothing in common with punishments in the legal sense, however much the victims may dislike them. They are purely administrative measures.

The contentions of Liszt met with a most sympathetic reception not only in Germany but in Europe generally. They were in many points in agreement with opinions which had been put forward, for example, in Italy by Ferri (though expressed by him in a somewhat extreme way) and in Holland by van Hamel. The supporters of these views organized themselves together to form a modern or sociological school under the name of the International Union of Criminal Lawyers and they carried on the struggle with ever-increasing vigour. As one might expect, they were opposed by equally ardent defenders of the old criminal law, at any rate as regards its fundamental conceptions. This is the less to be wondered at when we bear in mind, what I think has been demonstrated above, that the two parties were in truth waging the old battle between individualism and socialism which has been carried on all through the history of mankind and which we come across at every period in the history of law. The keenness and the logical force with which Liszt put his case provoked naturally an equally keen opposition. This was led by the great German criminal lawyer Karl Binding.

Liszt was in fact only too ready to sacrifice to his theory as to the true aim of criminal law those fundamental principles of constitutional law which the eighteenth and nineteenth centuries had worked out for the protection of individual liberty. For it cannot be denied that every increase of judicial discretion tends to restrict the legal guarantees which protect the individual within a certain sphere of action. Liszt, it is true, is not in favour of restoring the old arbitrary administrative power of dependent administrative authorities. What he wanted was to give the ultimate decision to independent courts of justice. And it is right to point out that even here Liszt makes certain reservations. Nevertheless, in the last resort what his argument leads to is an increased liberty given to the organs of the State and an extension of their arbitrary power, or, euphemistically speaking, of their discretion, and this is the very thing which the Constitutional State exists to prevent. Instead of the arbitrary power of the administration we have the arbitrary power of the Courts, but it is none the less arbitrary

power. And as time went on Liszt himself thrust ever more into the background that most profound conception which underlies the penal law of the Constitutional State which Liszt himself admirably expressed by the phrase that the Criminal Code is the criminal's Magna Carta. What becomes of this Magna Carta if an "habitual criminal"—a character extremely difficult to define—may be kept in preventive custody until he is cured, which may amount to imprisonment for life? And how does the Charter protect the prisoner, if under a Penal Code which leaves everything indefinite, such an extension is given to a judge's discretion as to leave him free, in effect, to pass any conceivable sentence?

But, although the opponents of Liszt entered the field at first as champions of the so-called classical school, it soon became apparent that the facts were too strong for them and that they were prepared to make great concessions to the demands of the time. In the end the fight became rather a fight between extreme views than a fight as to fundamental principles. For the classical school itself wanted reform, and considered the Penal Code of 1870 as out of date and old fashioned. But between them and Liszt there still remained one difference of principle. Liszt started, as we have seen, with the proposition that criminal acts committed in particular circumstances could not be reduced to the "types" of a code, and, for this reason, he was in favour of leaving to the judge an almost unlimited discretion. He rejected the method of the Penal Code of dealing with "types" of crime the characteristics of which were supposed to be based on experience. He advocated greater elasticity in punishments, and, in the end, by leaving to the judge a wider and wider range of choice of penalties, he arrived at a criminal law which was indeterminate and in fact variable. The rules fixed for certain "types" of crime disappear. On the other hand, the classical school started with the psychological assumption, in my opinion quite sound, that, speaking broadly, the psychological difference between people is not very great. On the contrary, they resemble each other so closely that they may be expected to react in a similar way to external pressure and, therefore, to punishments fixed according to the social standard of the day. Even in a particular crime human nature shows itself in a typical form. And it is a consequence following from this premiss that we can reason from the crime to the criminal and can therefore fix a "typical" punishment for the crime. No doubt the law must leave a certain freedom to the judge in regard to the particular

case. He must take into consideration the degree of the criminal *animus*, the intensity of which varies greatly in different cases, but, all the same, there must be limits to this freedom. In principle we must stick to the rule which applies to the typical case. We can frame no just scheme by reasoning from the abnormal cases.

It is true that in both camps there was a want of clearness as to where the line between the two views was to be drawn. There was even a lively discussion upon the question of what was the essential difference between the two schools. But, at bottom, the difference consisted in this, that the modern school aimed at fixing the penalty *individually*, that is, with reference to the particular case, whereas the classical school sought to do so "typically," that is, with reference to a definition, framed as the result of experience, of some "crime" which could be applied to this case.

This agitation for reform of the criminal law assumed before long a certain political complexion and the German legislator found it impossible to disregard it. On all sides it was admitted that the present Code was inadequate both in its general ideas and in many points of detail. At an early period there were already attempts at bringing about a drastic reform of the penal law. It would be not without interest to show the position taken up upon the questions already referred to as dividing the two schools in the various earlier drafts, of which some were by private persons, and others were more or less official. From the historical point of view the development is interesting.¹

¹ For the benefit of English readers the following abstract may be given. The German Ministry of Justice, ever since 1900, has been making most careful preparations for this reform. The first step was a theoretical study. Under the auspices of the Ministry a work on an extensive scale has been published comparing German and foreign systems of penal law. The publication began in 1906, and it has now been completed in sixteen volumes. It gives a comparative view of the criminal laws of all civilized countries, and it is a work of which German criminal lawyers may be justly proud. The first draft of a new German Penal Code, now known as the Commission's Draft, appeared as early as 1909. The supporters of the two opposing schools then agreed to combine in a joint work and they published in 1911, as a purely private publication, the so-called "Counter-draft" (*Gegenentwurf*). A commission of experts, convoked by the Ministry of Justice, then worked out a new draft—the draft of 1913. This draft was revised after the war, and the result was the draft of 1919. This again was gone over in the Ministry of Justice and, as the final result, the draft of 1925 was laid by the government before the *Reichsrat* for consideration. It was considerably modified by the *Reichsrat* and, in its amended form as the draft of 1927, it has been introduced as a government measure into the *Reichstag* and is at the present time under discussion by a committee. It is understood that the Bill of 1927 in the form in which it becomes law shall be passed by the Austrian Parliament so that, as far as criminal law is concerned, there will be one law for the two countries.

Any such inquiry, however, is precluded by want of space. All that I can do here is to examine the draft, which it is hoped will become law this year, with the view of determining to what extent it embodies the ideas of the reformers and to what extent it remains faithful to the principles of the Constitutional State and to the method of dealing with crimes "typically." On a superficial view the draft of 1927 does not strike one as having made any excessive changes. It starts with the principle which is to govern the whole Code *nulla pœna sine lege*. There are definite punishments laid down for definite "crimes," and, as under the existing law, we find pretty frequently a maximum and a minimum penalty prescribed. But we must not be deceived by appearances. The draft aims at introducing fundamental alterations. These consist firstly, in the almost unlimited extension of judicial discretion, and secondly, in a whole system of measures for prevention and cure intended to supplement the criminal law, strictly so-called.

In regard to these supplementary measures I shall confine my attention to those which are of special interest to us in this connexion because they limit the freedom of the individual. Such are provisions for placing persons in institutions where they are to be subject to treatment or nursing, as in homes for anti-alcoholic treatment, homes for insane persons, or the like, or provisions for the detention of offenders in the *Arbeitshaus*.¹ Lastly, there are the provisions as to preventive detention (*Sicherungsverwahrung*). As regards detention in one of these special institutions the criminal court is entitled only to pronounce a sentence that the offender *may* be admitted to one of them. Whether he actually is admitted or not is a question not for the Court but for the administrative officials. The judgment of the Court that the offender is admissible does not bind the officials except to the extent that they cannot admit anybody who has not been thus sentenced. But, in spite of the sentence, the officials can decide against the admission. The last word is with them and their discretion is in no way restricted. Detention in the institution is not to be longer than is required for its purpose, and upon this point also the decision is with the administrative officials. In certain cases a time limit is prescribed. This is so as to detention in a home for anti-alcoholic treatment or similar institution (*Trinkerheil oder Entziehungsanstalt*), and in the case of

¹ It seems better to avoid the word "workhouse," as its meaning in English is so different.

minors who are sent to a reformatory (*Besserungsanstalt*) instead of to the *Arbeitshaus*. As to the *Arbeitshaus* it is only in regard to the first detention that there is a time-limit. In other cases the persons there detained may be kept there for life subject to the condition that the Court shall hold an inquiry every three years to see if the circumstances continue to justify the detention. It must appear that the person is one whom it is reasonable to keep at work with the view of accustoming him to an orderly life. Admission to the *Arbeitshaus* may be on any one of the following grounds: begging, being "work-shy," dissolute conduct, sending children out to beg, being a vagabond, and, in some particular circumstances, prostitution. It follows that beggars, loafers, vagabonds, and prostitutes may be interned for life, although they have been convicted of criminal offences only on two occasions.

As to preventive detention (*Sicherungsverwahrung*) the situation is different. Here it is the Court only which can order the detention. The Court does not merely decide that an offender is a suitable person for such detention but it sentences him to be detained, and, conversely, a person in such detention cannot be discharged without the consent of the Court. The administrative authorities, on the other hand, are under the control of the Court except in so far as it lies with them to propose the discharge of a person so detained. It is only upon such a proposal that the Court can order the discharge. Further, even when no time-limit for the detention has been fixed the Court is bound every three years to hold an inquiry in order to satisfy itself that the circumstances continue to justify the preventive detention. In order to justify preventive detention the following things are necessary. The offender must be an habitual criminal dangerous to the public; he must have been once sentenced to death or to penal servitude (*Zuchthaus*); in addition, he must have been sentenced on another occasion for some intentional criminal act either to death or to imprisonment for at least six months; lastly, he must now, on a third occasion, have been convicted. It follows that after two previous convictions, one of which may have involved so trifling a sentence as that of six months' imprisonment, any third conviction, though in itself it might involve liability merely to a short period of imprisonment, may entail preventive detention. And it is left to the discretion of the Court to decide if this detention shall continue for life. It is true that taking the last criminal act in connexion with the preceding acts

the Court must be of opinion that the offender is an habitual criminal, dangerous to the public. But, to give a Court the power to characterize an offender after two previous convictions as an habitual criminal and to place no limits on the Court's discretion in this matter, betokens a degree of energy on the part of the legislator in dealing with habitual offenders which seems to go to the extreme limit. The truth of the matter is that these provisions in the draft as to preventive detention introduce in reality the indeterminate sentence which, as we have seen, was one of the principal reforms demanded by Liszt. It is only thinly veiled by being called a preventive measure. For the judge does not sentence the prisoner to confinement for a certain period, but for an unspecified time, and how long that time may be depends on considerations not of law but of policy. And, when we look more closely, and notice that the draft, out of regard for the administrative nature of these preventive measures, declines to apply to them the general rule that criminal laws are not retroactive, we shall be convinced that these preventive measures go a long way towards nullifying the rule *nulla pœna sine lege* if they do not altogether abolish it.

It is surely playing with words to say that confinement for life is not a punishment but merely a preventive measure. The person confined will consider it as a punishment and an extremely severe one. To allow, as the draft does, a man to be confined for life on his third conviction is a truly Draconian measure. And it is the more questionable because it depends on a finding by the court which is of an extremely vague character, namely, that the offender is a danger to society. It is natural enough that the draft should no longer reflect altogether the ideas of the Constitutional State as to the protection of the individual. But as the draft stands the freedom of the individual is left in the most complete way at the mercy of an unfettered judicial discretion.

This brings us to the second question, namely, that of the extension given to the discretion of the Court. It is the manner in which the draft has answered this question which gives it its special character. The draft goes very far indeed in extending this discretion. To begin with, in the special part it widens considerably the limits of possible sentences for the separate crimes. This is done particularly by giving up to a great extent the principle of fixing minimum punishments which in certain circumstances may be "raised." The result is that under the draft the judge is left free

in the particular case to pass any sentence between the minimum and the maximum.

Moreover, the draft determines the nature of the separate crimes in a relative instead of an absolute manner. That is to say, it lays down as *indicia* of a particular crime facts to which the judge is free to attach a greater or a less weight, so that it is really the Court and not the law which decides if the elements required to constitute the crime are present. To illustrate this we may refer again to the conception of the "habitual criminal." Moreover, *in every case* the Court is free to vary the normal punishment and to impose a milder sentence if there are extenuating circumstances. Besides this general power, power is expressly given to reduce the punishment in a number of cases, such as defective capacity, inexcusable mistake of law, attempt to commit a crime, aiding and abetting and so forth. In these ways a great reduction of the punishment is possible. Instead of the death penalty we may have penal servitude for life or for a period of not less than three years. Instead of imprisonment for life we may have imprisonment for not less than three years. Where the sentence of imprisonment is for a fixed period, the maximum is three-fourths of the primary maximum, and where the primary minimum is a "raised" minimum, it is replaced by the normal unraised minimum.¹

Instead of a period of penal servitude, we may have imprisonment for not less than three months. Instead of a period of imprisonment for a crime (*Verbrechen*) there may be a sentence of not less than three months of simple incarceration (*Einschliessung*).²

In the case of minor offences (*Vergehen*) the Court, instead of a sentence of not more than three months' imprisonment, can impose a fine if this in the circumstances will be a sufficient punishment. In cases of a specially trivial nature the Court may refrain from imposing any punishment, but these must be cases of a kind specially indicated in the law.

The Code lays down no absolute rules as to the form of im-

¹ Imprisonment according to the general law may be for a period varying from one week to five years. If in the particular case the minimum penalty prescribed is higher than the general minimum (one week) and is, for example, three months, then if there are extenuating circumstances the judge can reduce the penalty to one week.

² *Einschliessung* = *custodia honesta*. It is a punishment only awarded when the conduct of the offender was not dishonourable. The prisoner is not called upon to work, and he enjoys special privileges. It may be compared with our imprisonment in the first division.

prisonment for particular crimes. The Court has the choice between penal servitude or imprisonment (*Gefängnis*) on the one hand, and simple incarceration (*Einschliessung*) on the other. In every case in which a prisoner is liable to penal servitude or imprisonment he may be sentenced to simple incarceration. But this is always subject to the conditions (1) that the accused acted entirely from worthy motives, and (2) that the act was not specially reprehensible on account of the manner in which it was done or of the results thereby caused. But, here again, everything depends on the unfettered opinion of the Court. As for the principle of fixing a maximum and a minimum penalty, it is in effect thrown overboard. Under the draft it is not uncommon to find a difference of many milliards of marks between the maximum and the minimum. The result is that the punishments laid down are so indeterminate that the step to an indeterminate penal law is a short one. The truth is that we have already in this draft an indeterminate penal law in a form no doubt modified and concealed but still recognizable.

This is not the place to criticize the fundamental principles of the draft of which a brief sketch has been given and to explain their relation to the views of the two opposing schools to which I have referred. If I were to do so I should enter a strong protest against the altogether excessive extension given to judicial discretion. Arbitrariness, even if it be on the part of a Court, is still arbitrariness and therefore never inspires confidence. On the other hand, I should support the draft in so far as it supplements the existing penal law by a system of measures for the prevention of crime, though in this matter the draft carries to excess principles sound in themselves. But I am not concerned here with criticism. My object has been to show how the draft stands in regard to the great problems of the development of penal law and to indicate its place in the history of that subject. This, at least, may be said definitely. In the battle between the sociological and the classical school the draft has taken up a decided position. It is not a compromise. The victory of the new school is manifested in the draft in the clearest manner.

The ideas of the old Constitutional State no longer underlie the law. The draft regards the relation between the individual and the State as consisting primarily in duties which the citizen owes to the State and in his solidarity with the community. The freedom of the individual is not the first thing to be considered.

Moreover, by giving to the judges a discretion which is practically unlimited the draft breaks away from the old notion of "types" of crime and endeavours to treat the subject in an "individual" way, and to make every particular case a law to itself. In this respect the draft is too one-sided, and its break with the old law is not a real reform. It is certainly too early to affirm that the new law is likely to remain in force as long as the old Penal Code has done. Theories pushed to extremes are apt to avenge themselves sooner or later. There is bound to be a reaction. The principle of individual freedom has such deep roots in society that a Code which ignores it or treats it with slight respect is hardly likely to be successful in the long run.

MIXED MARRIAGES.¹

[*Contributed by* LESLIE DE GRUYTHER, ESQ., K.C.]

FROM time immemorial, men and women of different nationalities, race and religion have intermarried, and the reports are full of rulings on various questions which have come up for determination in connexion with such marriages. With few exceptions, the cases relate to marriages between Christians, and the very essence of a Christian marriage is the voluntary union of one man to one woman to the exclusion of all others, for the term of their natural lives. There is, however, another class of marriage, viz. that between an English woman and a Hindu or Mohammedan man. As both the Hindu and Mohammedan law allow polygamy, to such a marriage entirely different considerations apply and the number of decided cases is very few.

The increased facilities for travel have brought to England very large numbers of Indians ; some are here as students, some for business, some for pleasure. Social intercourse has naturally led to many of them marrying English women, and I very much doubt whether either the husband or the wife has at the time of the marriage any adequate conception of their legal rights and liabilities or of the incidents which result from such marriage.

It is not possible to deal with all the varied questions which may arise in connexion with such marriages, and I shall, therefore, confine myself to the case of most frequent and ordinary occurrence, *i.e.* the case of a Hindu or Mohammedan domiciled in India going through a ceremony of marriage with an English woman in England. I propose to consider such a marriage in three aspects : (1) the validity of the marriage ; (2) the dissolution of the marriage ; and (3) the rights of inheritance consequent on the marriage.

The Validity of the Marriage.—The validity of all marriages is dependent on two factors. One that the parties should have taken part in some ceremony effectual in law to make them husband and

¹ Reading delivered in the Middle Temple Hall on November 24, 1927.

wife. The other that the parties taking part in such ceremony possess the capacity of marrying each other. For if either party is incapable of contracting a valid marriage, it is obvious that the ceremony cannot confer the capacity.

I take it to be settled law that where a ceremony of marriage is performed in any particular country, and that by the law of that country such ceremony is effectual to constitute a valid marriage, every other country will recognize the ceremony as a sufficient compliance with formal requirements.

Applying this law to the particular marriages I am discussing, a ceremony of marriage between a Hindu or Mohammedan and an English woman before a Registrar would be recognized as a valid and legal contract of marriage in India. I refer to a marriage before a Registrar because it is not conceivable that such a marriage could be celebrated in a place of Christian worship. This is, however, only the beginning of the inquiry, since it is essential to determine whether a Hindu or Mohammedan man can by the law to which he is subject marry an English woman. Different considerations apply to Hindus and Mohammedans since they are subject to systems of law widely divergent, and I propose to deal with them separately. As stated by Lord Selborne :

It is well settled that the general rule, internationally recognized as to the constitution of marriage, is, that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere if it is well constituted, *secundum legem loci contractus*. But that only determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the place of solemnization the parties become husband and wife. But when they become husband and wife what is the character which the wife assumes ? She becomes the wife of a foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore, it must be within the meaning of such contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect of the matrimonial relation and all other consequences depending on the law of the husband's domicile.¹

¹ *Harvey v. Farnie*, L.R. 8 App. Cases 43.

There is also a general principle that the capacity of any person to marry is determined by the law of his or her domicile.

Hindus.—I will now turn to the capacity of the Hindu man domiciled in India to marry an English woman. The Hindu conception of marriage is not that of a civil contract but of a sacrament. To obtain regeneration, there are various sacraments or religious ceremonials performed, the last of which among the higher castes is marriage, while among the lowest class it is the only sacrament which they can observe. Further, the object of marriage is to obtain a son, for the soul of a Hindu is saved from *put*, the equivalent of our Hell, by religious offerings made by his son, and so much importance is attached to the necessity and efficacy of religious observances by a son that a very important portion of the Hindu law is directed to the adoption of a son, who by legal fiction is regarded in all respects as a natural son. The direct connexion between religion and law cannot be better illustrated than by the fact that in Bengal the priority in inheritance depends on the efficacy of the religious offerings that can be made by the heir, the person whose offerings are most efficacious having a preferential right to succeed.

A Hindu is born a Hindu, no one can by profession of faith become a Hindu, and the Hindu marriage being a sacrament the Hindu law does not permit of a marriage between the members of one caste of Hindus and another caste of Hindus. A marriage between a Hindu man and a Mohammedan woman is absolutely invalid, and equally by Hindu law a marriage ceremony between a Hindu man and an English woman, wherever celebrated, would be held in India, which is the country of the domicile of the man, to be wholly invalid and the marriage would be treated as a nullity.

If a Hindu renounces his religion he would no longer be a Hindu, and the prohibition by his law ceasing to operate he could contract a legal marriage in the presence of a Registrar in England. There would still be left in doubt the precise matrimonial relations resulting from such a marriage and also the mode in which his estate would be distributed on his death intestate.

Mohammedans.—I now pass to marriage with Mohammedans. Marriage by Mohammedan law is a civil contract; it involves no religious element and no religious ceremonial is essential to its validity. Although the capacity to marry rests on the same basis and depends on the same conditions as the capacity to enter into any other contract, a marriage with an idolatrous female is pro-

hibited. As a result a Mohammedan cannot marry a Hindu. On the other hand, the Moslems recognize as valid a marriage between a Mohammedan man and a woman belonging to the " Scriptural sects " or believing in God. A Mohammedan can therefore validly marry an English woman. As I have already indicated, a marriage ceremony performed in England before a Registrar would be sufficient to constitute a marriage by the law of India.

It is necessary to remember that a Mohammedan can by this law have four wives at the same time, and the lady married in England may not be the first. I have seen an opinion by eminent Counsel that if a Moslem has a living wife at the time he contracts a second marriage in England, he can be indicted for bigamy. This may or may not be so, but in India the second marriage would be valid.

The Dissolution of the Marriage.—There is definite authority that matrimonial status is governed by the law of the domicil of the parties ; that the domicil for the time being of the married pair affords the true test of jurisdiction to dissolve their marriage and that the differences of married people should be adjusted in accordance with laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws. Whether the marriage with a Hindu or Mohammedan can be dissolved, the conditions on which dissolution is permissible, and the mode in which dissolution is effected, must therefore be determined by the law of India. So far as Hindus are concerned, there is no such thing as divorce. Mohammedans permit the husband to divorce his wife at will without the commission of any matrimonial offence, and without recourse to any Court or judicial officer. This arbitrary power conferred on the husband seems at first sight unreasonable, but in practice is checked by a contract made at the time of every marriage for the payment of dower to the wife. The amount fixed is payable at the termination of the marriage either by death or divorce, and the liability thus incurred is an effectual deterrent against the capricious exercise of a man's power to divorce his wife, while contract for dower operates as a settlement on the wife. When the husband dies, the wife's dower must be paid like other debts before there can be any distribution of the husband's estate among his heirs.

So far as I know there is no provision for a wife divorcing her husband, though for sufficient cause she is entitled to live apart from him and to receive an adequate allowance.

The Rights of Inheritance.—I have now reached the third question relating to these marriages. Among Hindus, the marriage itself being wholly invalid, neither the wife nor the children, if any, of such a marriage could have any rights of inheritance. On the death of the Mohammedan husband the distribution of his estate would be in accordance with mode of distribution directed by the Mohammedan law. If the husband had no children by any of his wives, his widows would all jointly take one-fourth of the estate, the remainder passing to other relatives. If there were children by any one of the wives, the widows between them would only receive one-eighth share, and the children would, after provision for the father and mother of the deceased, get the residue. In apportioning the residue, the share of a son would be twice the share of a daughter, and there would be no right of representation enabling the children of a deceased son or daughter to share with their uncles and aunts. The system of distribution is complicated and I refrain from further details.

So far I have dealt with purely Indian law, *i.e.* the law of the domicile. Questions of a similar character to those mentioned can and will arise for determination in England, and when they do arise ought to be decided by the law of the domicile, which is the law of India. To take the most simple illustration which must be of constant occurrence, *viz.* that of a Hindu or Mohammedan dying intestate and leaving personal property in England (I deliberately refrain from any reference to realty), the questions that will at once arise for decision are, what persons are entitled to succeed? and in what shares? I find it stated by eminent authority¹ that the universal doctrine now recognized is that the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death. It is of no consequence what is the country of the birth of the intestate, or of his former domicile, or what is the actual *situs* of the personal property at the time of his death; it devolves upon those who are entitled to take it, as heirs or distributees, according to the law of his actual domicile, at the time of his death.

This involves that the persons who are to take and the shares they take are determined by the law of the domicile, and so far as relates to the persons whether they fall within the definition of wives or children must also be settled by that law. If, for example, a Hindu or Mohammedan died domiciled in India, and by Hindu

¹ Story, s. 48.

or Mohammedan law his widows or his children were entitled to certain shares in his estate, the question whether they were the widows and children and as such entitled to shares in England must be determined by the personal law applicable to them, *i.e.* by Indian law and not English law.

Matrimonial Relief.—Another question which has arisen and may easily arise again is what relief, if any, can be granted under the Matrimonial Causes Act to an English wife against her Indian husband. Can she apply in England to obtain a divorce or a judicial separation? In my opinion, she cannot, although in the case of *Chetty v. Chetty*,¹ a judicial separation was granted. The facts of the case were that Chetty while in England married an English girl. He returned to India, while she remained in this country. It was held that his conduct amounted to desertion, and as a consequence the wife was entitled to a decree for a judicial separation with alimony. The main defence to the petition was that the Divorce Court in England had no jurisdiction on the ground that there had been no valid marriage between the parties, and because the husband was domiciled in India. The learned President rested his decision on the ground that by the Hindu law as found by him on the evidence the disability of a Hindu to contract a marriage with a Christian was of the nature of a religious disability similar to that imposed by certain continental nations on the marriage of a priest or nun and therefore of a character which the Courts of England would not recognize. He also held that no country is bound to recognize the laws of a foreign State when they work injustice to its own subjects, and that Chetty having married an English woman in England could not be permitted in England to assert that he was incapable by the law of his domicile from contracting the marriage into which he had voluntarily entered.

This decision is open to criticism. In the first place, the Matrimonial Causes Act transferred the jurisdiction from the Ecclesiastical Courts to "the Court for Divorce and Matrimonial Causes." It is unthinkable that the Ecclesiastical Courts could have regarded as a valid marriage a union in which the husband was permitted to have several wives, *i.e.* a marriage which could not be regarded as a Christian marriage. The whole scope of the Act is based on this conception of marriage. It has been directly decided that the Divorce Court would not exercise jurisdiction in the case of a Mormon marriage even though the husband had never contracted a second

¹ L.R. 1909 P.D. 67.

marriage.¹ The express ground of decision was that the provisions of our matrimonial system are not applicable to such a union as I am discussing, and that there is in England no law framed on the scale of polygamy or adjusted to its requirements, and that as the compact of a polygamous union does not carry with it those duties which it is the office of the marriage laws in this country to assert and enforce, such unions are not within the reach of that law.

If an English woman in a marriage of the type indicated be entitled to a judicial separation in England on the ground of desertion, why not a divorce on the ground of adultery in addition to the desertion? And why should not a second marriage by the husband, though permitted by the law of his domicil, be regarded as adultery? The further reason for my opinion that the Divorce Court in England cannot dissolve these marriages is that the House of Lords has recently in *Salvesen v. Administrator of Austrian Property*² affirmed previous decisions which established that the Courts of the country where the husband is domiciled have exclusive jurisdiction to dissolve a marriage,³ and that nothing short of a full juridical domicil can justify a British Court in pronouncing a decree of divorce.⁴ The Courts where the husband is domiciled will proceed in accordance with the law of the domicil, and if by that law there can be no divorce, the Courts of the country in which the wife was domiciled prior to her marriage cannot grant her matrimonial relief which she could not obtain in the Courts of the country where she is in fact domiciled by virtue of her marriage.

I think the learned President was also mistaken in his view that the incapacity of a Hindu to marry a Christian is analogous to the disability imposed on a priest or a nun, or on a negro in certain American States. The Hindu law and the Hindu religion are in many matters inseparable, and the Courts in England are bound to give effect to the Hindu law as such.

The application of a personal estoppel operating in the Divorce Court cannot be of universal application. On a distribution of the personal estate of a Hindu or Mohammedan domiciled in India, the distribution would be in accordance with the law of India and it would at least be anomalous that the status of wife should be held established by estoppel for the purpose of granting relief in the Divorce Court and that the same status should not exist for

¹ *Hyde v. Hyde*, L.R. 1 P. and D. 130.

² *The Times* L.R. 43, 609.

³ *Attorney-General for Alberta v. Cook*, [1926] A.C. 444.

⁴ *Lord Advocate v. Jaffrey*, [1921] A.C. 146.

the purpose of succession. Marriage, although a contract, is an institution, and the incidents attached to a marriage as well as its validity must depend on the law of the matrimonial domicile.

Conclusion.—I have for many years taken an interest in the legal problems connected with these mixed marriages and am expressing only my own opinion. It is plain that there should be no doubt or misunderstanding on the validity and incidents of these marriages which affect so large a body of British subjects. I can see no reason why any British subject should not, if he so please, marry any other British subject, and both parties being British subjects, all the problems and difficulties to which I have referred can, and I think should be, solved by legislation. Provision should be made to validate these marriages, to provide a mode by which they can be contracted, to declare the legal incidents of such marriages and to settle the rights of inheritance accruing to the wife and children. If such legislation be undertaken, I suggest that it may be well to consider whether or not conditions should be imposed prohibiting such marriages if the husband has already a wife living at the time of the marriage and also prohibiting the husband from marrying a second wife while his marriage with the English woman is subsisting ; these restrictions would, I am told, be in conformity with modern social developments in India, which is in the direction of monogamy in practice, and also in accordance with the Mohammedan law as now administered in Turkey, where polygamy is prohibited by edict.¹

In directing attention to an unsatisfactory state of affairs, I hope at the same time to have offered some suggestions for their amendment ; and so shown that the ancient practice and tradition of an Inn of Court can be adapted to deal with the modern requirements of a world-wide Empire.

¹ The Turkish Embassy has been good enough to verify this statement.

THE REGISTRATION OF LAND IN PALESTINE.

[Contributed by HIS HONOUR MR. JUSTICE TUTE, *President of the Land Court, Jerusalem.*]

Main Tenures.—The chief tenures in Palestine have been explained and discussed by the present writer in an article entitled "The Law of State Lands in Palestine," which appeared in this *Journal* in 1927.¹

For the benefit of those who have not read the article in question it is advisable to summarize those features of it which have a bearing on land registration. We may therefore state briefly that the main tenures in which private interests exist, and which are the subject of registration, are three in number: The first is Mulk, which corresponds roughly to an English freehold. The second is Wakf, which arises in its perfect and most important form from the dedication of mulk to a purpose which the Moslem law regards as pious or charitable. As a fact the beneficiaries of these dedications are generally members of the dedicator's family and their descendants. The tenure has some resemblance to the old mortmain of the Church in Western Europe.

Finally, we have the Mirie or State lands. These lands occupy the bulk of the agricultural area of Palestine. They were regarded as the private property of the Sultan from the time of the Moslem invasion and were administered by his deputies. Under the Turkish Empire these deputies were the Sultan's feudatories, who in return for the right to collect tithe and taxes from the cultivators of their fiefs had to serve in the Sultan's armies in time of war with contingents of troops raised and officered by them. They had also to pay, annually, a certain rent.

The cultivators of the fiefs were tenants at will and paid to their overlords a proportion of the crops raised by them. This tax is called the tithe because it is usually estimated at a tenth of the produce. They were also liable to pay another tax which was estimated in cash on the basis of the value of the holdings. At the

¹ See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. 4, p. 165.

present day this cash impost—called the Werko—is calculated at 4/1,000 of that value.

In 1339 the feudal system was abolished to admit of placing the army on a more modern basis. The old fiefs, corresponding roughly to one or more village areas, were then let out to tax farmers. These farmers had no interest in the welfare of the Sultan's tenantry, and practised extortion on a wide and merciless scale. As a result many villages were ruined and abandoned, and the flow of the main stream of the Imperial revenue diminished.

It was for the purpose of reforming this state of affairs and to restore the prosperity of the agriculturist that the Land Code of 1858 was framed. By that Code the holders of the State lands were in effect made owners of their holdings, subject to the liabilities of keeping them under cultivation and of paying tithe. They were given power to sell or mortgage, and could pass their lands to their descendants under a statutory scheme of inheritance. They were guaranteed in their holdings and rights by means of title-deeds.

It is clear that this legislation could only be given effect to by setting up a system of land registration. Laws were passed for this purpose in the two years which followed the passage of the Land Code, and the work of registration continued for about twenty-five years. During its progress—in 1876—the Mulk Titles Act was passed, which provided for the registration of this tenure. Similar legislation was undertaken to secure the registration of wakf, but it was never acted on.

On the basis of this prefatory sketch we may proceed to examine the history of the registration of each of the main tenures in further detail.

Mulk and Wakf Properties.—Prior to the passage of the Land Code, the only tenures which were recognized by the Moslem law as conveying rights of ownership were those of mulk and wakf.

The deeds of dedication by which mulk properties were converted into wakf were registered in the Sheria Courts. These Courts also registered sales and mortgages of mulk property. Registration consisted in the entry of a certified copy of the instrument in the Sheria books. It was therefore a registration of deeds. In the case of a wakf, registration of the deed was supplemented by a declaration, made in judicial form by the Cadi, of the transfer of the land affected from its former private owners to the Deity. To this extent the Sheria registration became a registration of titles.

Conversion of Mirie Holdings into Mulk.—It has been shown in

the article on the Law of State Lands, to which reference has already been made, that persons who were in a position to convert their Mirie holdings into mulk, were under considerable inducement to do so. The chief way in which this was done was by planting groves on the holdings, or by building on them. Holdings transformed in this way by a feudatory would be retained by him even after his fief had been sequestrated and given to another. In the days of the tax-farmers, mulk property, being exempted from tithe, was exempt from the chief exaction to which the Mirie holder was subjected. This stimulated the process of transforming Mirie into mulk. It was, of course, one of theft from the State.

The Sheria Courts facilitated it. They registered deeds of sale or mortgage in which the lands affected were described as mulk. This enabled the now reputed mulk owners to dedicate, and thus to bring their lands under the full protection of the Moslem religious law, while retaining the enjoyment of its benefits for themselves and their descendants.

After the passage of the Land Code the process was continued but became definitely illegal. The Civil Courts tended to co-operate with the Sheria Courts, and decisions are still quoted to the effect that Sheria registration of a transaction in land, which describes that land as mulk, may be accepted as *prima facie* proof that it is mulk. The position became so scandalous that during the second decade after the passage of the Land Code, Firmans and Orders were issued which expressly laid down that Sheria registrations describing land as mulk were not to be accepted as proof, *prima facie* or otherwise, of the tenure. The Mulk Titles Act, which belongs to the same period, by laying down that mulk property consists in land which is so registered, or for which the holder is in possession of a Firman describing it as mulk, further circumscribed the activities of the Sheria Courts, by authoritatively defining what was and what was not mulk property. At the same time the civil or Tapou registration initiated by the Mulk Titles Act was substituted for that hitherto practised by the Sheria Courts. The latter then ceased to register rights in mulk properties other than those created by dedication.

Civil Registration of Wakf Properties.—We have already noted that the legislation intended to effect the civil registration of wakf properties of the perfect class was abortive. This means that the record by which dedication is established still consists in the registration of the deed of dedication in the Sheria Courts, which has been

described, together with the decision of that Court affirming the transfer of ownership to the Almighty.

Registration of Mirie Land.—To return to Mirie land—the Registration Acts which followed the Land Code set up registration districts and registration authorities. In each district authority to register was vested in a body known as the Majlis il Idara (Administrative Council), on which the Treasury and the Administration were represented.

In order to effect the initial registration, the Councils sent touring commissions through the villages which registered the holders of Mirie lands chiefly on the basis of possession. Disputes were dealt with by the Civil Courts. This registration was known as the Euklama, or registration by local inspection. Each claimant had to support his right by a certificate signed by the Mukhtar and notables of the village, which set forth the facts of his possession and reputed title to the land.

When the Euklama register of a village was completed, it was scrutinized by the Majlis il Idara, and then certified by it.

Changes in Ownership.—Subsequent changes in ownership were dealt with by the Majlis on the same lines. Claims to registration had to be supported by certificates, and on this basis mortgages, sales and changes necessitated by death were recorded from time to time. The powers of the Majlis did not extend to the decision of ownership disputes. The parties to such a dispute had to be referred to the Civil Courts. This limitation of the powers of the registrar was, of course, both normal and proper. It is found under all civilized systems of land registration.

The Ottoman system had certain defects some of which are inherent and therefore inevitable, while others arose from mal-administration.

Cadastral Surveys.—No cadastral survey existed. This made it impossible for a Euklama commission to be sure that any given village with which it dealt had been completely registered. All they could be sure of was the fact that all *claims* had been dealt with. As lands such as common and waste, in which rights are either communal or belong to the State, were not made the subject of claims, it follows that they were left unregistered. To this day the areas which fall within these classes are for the most part undefined.

The Tithe.—The Land Code dealt with Mirie holders as tenants of the Sultan, and in that capacity the only tax payable by them

was the tithe. This circumstance limited the responsibilities of the Commissions by restricting their scope.

The tithe was assessed by inspection of the crop at each harvest, as it lay cut and stacked on the official threshing-floor. Assessment took the form of a lump demand from the whole village, and took no account of the manner in which individual cultivators severally contributed to its payment. The demand was subsequently distributed by the villagers themselves in a manner which has been indicated in the article on the State lands, and need not be recapitulated here. The point which it is essential to note for our present purpose is that, since the State was not concerned with the individual contributor, the area and quality of his holding were matters of little importance to the Euklama commissions. These commissions therefore contented themselves with defining holdings by means of a statement of their boundaries, supplemented by wild guesses at the areas. The statement of boundaries took the form of a recital of the names of the adjoining owners, or (when no adjoining owners existed) described natural features such as ravines, waste lands or roads.

Records of Areas.—The record of areas consistently erred in the direction of an underestimate of an exaggerated kind, which seems to have been supplied by the holders themselves, and to have been accepted by the Euklama commission without check or question. This may have been collusive and intended to reduce the registration fee, which was supposed to be based on the value of the land. If so, it must have been a useful source of income to the members of the commission. It may also have been intended to anticipate the assessment of the werko tax, with which we will deal later.

Masha System.—A third source of imperfection in the record was the Masha system. This system has been explained in detail in the article to which reference has already been made. Here it need only be said that the term Masha is used to describe lands which are owned in common. A very large number of villages in Palestine are owned in this way. Further, as the law of inheritance contemplates the division of a dead man's property amongst his heirs in shares which are elaborately detailed, it follows that joint heirs must own in common until a partition takes place between them. Thus the Masha system constantly tends to extend to the smaller units of property.

In the case of communally owned villages in which land is periodically redistributed in accordance with local custom, it is

clearly impossible to give each cultivator a title-deed for a definite piece of land, in spite of the fact that this is the condition which the Land Code contemplates and enjoins. In these cases a commission used either to record the names of all the persons entitled at the time of its visit, and note opposite to each the fractional share to which he was entitled, or—more commonly—it merely recorded the names of the heads of the existing families. In the first case it was difficult, in the second impossible, to note the changes in ownership arising from inheritance. The impasse was accentuated by the fact that Masha villages generally work on a scheme of inheritance which is not recognized by law, and which, for this reason, cannot be given effect to by registration. In some villages each child acquires a share at birth ; in others only male children acquire ; in others females who marry out of the village lose their rights. The variations are numerous, but they have in common the circumstances that they are not capable of legal registration.

The net result is that in the Masha villages the records which were compiled fifty or sixty years ago have remained unchanged, though practically all the originally recorded holders are dead and the land is held by their descendants. They are of course useless for any purpose except the promotion of litigation.

The Masha which has arisen from separately owned land solely through the operation of the law of inheritance is generally better recorded. Successions are sometimes registered, and in most cases the facts of inheritance from deceased registered owners can be ascertained.

Defects due to Bad Administration.—The defects which we have hitherto described may be considered inherent in an imperfect system, and therefore inevitable. Those due to bad administration must now be glanced at. They have arisen in the main from systematic breach of the law on the part of the owners of Mirie lands. The Land Code provides for the compulsory registration of all transactions, and requires all persons to register their interests as they arise. These provisions have been very extensively ignored.

Privately Executed Documents.—There can be no doubt that, before the Land Code was in existence, the holders of Mirie lands had evolved a customary procedure for dealing with land on the basis of privately executed documents. Though, at the period of which we are speaking, such documents had no legal validity, because the law then regarded Mirie cultivators as tenants at will with no

rights but that of inheritance, it is fairly clear that they were enforced by local custom. After the passage of the Land Code the custom continued, and operated to defeat the provisions of that Code which were inconsistent with it. Thus within a given locality sales and mortgages which took place between neighbours were often—indeed generally—made, in defiance of the law, on the basis of private documents. The parties to such a document were satisfied that its terms would be adequately enforced by local custom and local public opinion.

It follows that the official or Tapou Register contains the names of many persons who no longer even profess to have an interest in the properties which it attributes to them.

Much the same thing holds good of successions. The heirs of a deceased holder were adequately guaranteed in their rights by public opinion. They were, therefore, unwilling to undertake the expense and trouble of recording these rights in the Tapou Office, unless circumstances compelled them to do so. Thus, if they wanted to sell to an outsider, recourse to that Office might be necessary.

When this contingency arose, however, they could always have the register corrected on producing an inheritance certificate from the Sheria Court, and on paying the fine, if any, which had accrued.

Penalties for Failure to Register.—The law provides penalties for failure to register; but this fact actually militates against recourse to registration, since, when a penalty has been earned, the person liable to it is furnished with a fresh motive for avoidance of the Tapou Office.

Werko Tax.—So far we have discussed the registration of mulk and mirie in the Tapou Office, and the registration of wakf in the Sheria Court. The first two are pure registrations of titles. The third is a registration of deeds plus a declaration of title. All three registrations deal with rights only.

We now come to a fourth registration, distinguished by being a record of liabilities. It is that of the werko tax. We have seen that in the case of Mirie land it consists in a cash payment based on the estimated value of the land, and calculated at 4/1,000 of that value. It is payable by mulk and wakf properties at double this rate.

In the days of the feudatories the feudal lord must have known the names and holdings of his tenants, either personally or through his agents. Under such a rule the werko tax could have been, and

doubtless was, assessed and collected as part of the routine of management. During the régime of the tax-farmers, however, when no record of holdings existed, the tax must have fallen into disuse except, possibly, as an excuse for undefined exaction. Some years after the commencement of registration by the Euklama commissions, it was felt that steps should be taken for the purpose of reintroducing the werko tax. The local officials were anxious to do so, because the werko tax was assigned by tradition to the support of the local administration, while the tithe was remitted direct to the Imperial Treasury.

Accordingly, during the second decade after the passing of the Land Code, commissions, resembling the Euklama commissions which were then engaged in compiling the Tapou record, were set up for the purpose of assessing all properties to the werko tax. These commissions did not avail themselves of the work already done by the Euklama commissions. The reasons for this are obscure. It was probably due to the fact that they represented a local as opposed to an Imperial interest, and jealousies arose. Moreover, there were practical difficulties in the way of utilizing the Tapou record.

We have seen that the Tapou Registers already compiled could not be used for assessing the werko; because the areas given in them were systematically understated. They were therefore useless as a basis for the calculation of the values on which the werko depended.

Finally, it appears that the werko commissions did their work in an order which had no relation to that observed by the Euklama commissions. It was therefore a matter of chance whether a village visited by the latter had or had not been previously registered by a Euklama commission.

For these and possibly other reasons the werko commissions worked *de novo*. They not only measured, classified and assessed holdings, but they recorded the names of their owners without reference to the Tapou authorities. They had independent offices at the administrative centres, and the werko demand was maintained and collected by staffs independent of those which assessed and collected the tithe and maintained the Tapou registration.

As time went on some sort of liaison was established between the two systems by which changes effected in the Tapou Register were supposed to be communicated to the werko authorities. The liaison does not seem to have been very effective, since it has not greatly

diminished discrepancies between them. Discrepancies existed from the outset on a scale which can fairly be described as enormous, and they have continued to exist on much the same scale to the present day.

Relative Authority of Registration.—It is clear that the question of the relative authority of the two registrations for the purpose of establishing ownership was bound to come to the front before long. When this happened it became obvious that a claim to ownership which could be supported by proof of payment of werko tax was *prima facie* stronger than one which rested on a registration of title only. On the other hand, the last-named registration was the proof appointed by law for the purpose of establishing ownership, and, however imperfect it might be, it was felt that nothing should be done to impair its validity. The dilemma was solved in practice by making it impossible to identify from the werko receipt the land in respect of which a given payment was made. Further, the werko authorities were allowed and encouraged to accept payment from unrecorded persons without inquiry as to the right by which payment was tendered. Finally, certain legal provisions were made, as in the magistrates' law, which aimed at depriving the werko record of evidential value.

Thus the law referred to implies that, in the trespass and boundary disputes with which a magistrate deals, he is not to regard a werko entry as being of the nature of a title-deed.

In permitting this development the Turks made a costly mistake and, at the same time, missed an opportunity of putting land registration on a self-maintaining basis. From the former point of view they committed themselves to the waste and expense involved in the maintenance of two sets of registration staffs. Their mistake under the second head requires more detailed explanation.

Legislative Compulsion to Register.—The discussion of registration in English legal circles generally centres round the rival claims of registration of titles and registration of deeds. The advocates of each system aim at establishing a record which will maintain itself for all time without legislative interference other than that necessary to initiate it.

They differ as to the form which registration should take ; but agree in supposing that legislative compulsion to register will suffice to secure that all transactions and changes are duly brought on the official record to the end of time.

Now, from what has been already set forth it is clear that this

assumption is not true of Palestine, where legislative compulsion to register has been habitually and widely disregarded. There is no ground for assuming that further legislation of the same kind will meet with greater success, so long as the present basis of Tapou registration remains unchanged.

Combination of Tapou and Werko Records.—We have seen that the official record of rights in Palestine—the Tapou registration—is in form an absolute record of titles ; whereas in fact it is often absolute or misleading.

The register of the werko is an artificially degraded record of titles, accompanied by an absolute record of liability. If the Tapou and werko records are combined, we shall obtain an absolute record of titles balanced by an absolute record of liabilities in a single register. A register so framed will tend to maintain itself automatically in respect of all transfers, since it is clear that no owner will part with his interest to a purchaser in a form which leaves him liable to pay the taxes on the property. This will, however, be the result of any sale which does not pass through the Tapou Office, and does not result in the substitution of the purchaser's name for the seller's. In other words, the record of a liability side by side with that of a right provides a motive for registration which is based on self-interest and therefore effective. It may be noted that this principle is axiomatic in the temporarily settled districts of India. In those districts the revenue registers invariably associate the name of the owner with the revenue assessed on his holding. The registered owner continues to be liable to pay the revenue so recorded as long as his name remains on the register. Under these circumstances he makes haste to register as soon as he parts with his interest, and the record becomes self-maintaining.

In this connexion it may be noted that the records of the permanently settled area of Bengal are in a state of confusion, which contrasts strongly with the automatic and successful working of the ownership registers of a temporarily settled Province.

In the writer's opinion, no reform of the existing Tapou Registration is worth undertaking which does not rest on the unification of that register with the werko, and the entry of the werko demand side by side with that of the rights of the persons from whom it is collected.

CRIMINAL PROCEDURE BEFORE MAGISTRATES IN ENGLAND AND WALES AND INDIA.

[Contributed by A. SABONADIÈRE, ESQ., I.C.S. (*retd.*).]

Introductory.—Differences in methods of legislation and in the organization of the courts and the police account for various contrasts between criminal procedure in England and Wales and criminal procedure in India. One such of outstanding importance relates to the admissibility of statements made by accused persons to the police or while in police custody. In what follows some of the differences in procedure will be touched upon, and the law of Scotland will also be referred to, by way of comparison, at some points.

Legislative Methods.—It is to be hoped that the various legislatures in India will avoid "legislation by reference," a bad habit of long standing in the Parliament of the United Kingdom. No doubt this method of drafting bills minimizes the opportunities for obstruction by the Opposition, but it is principally due to the rule, which surely could be abolished in these over-crowded days, that a Bill cannot be carried over from one session to another, even in the same Parliament. For the most part this fault has been avoided by the Indian legislatures, both in their early days when they were composed entirely of nominees, and principally of officials, and in these later times when elected members have become a larger and larger portion of the councils. Originally, in the sixties or thereabouts, there was a clear field, and fortunately when lapse of time made it necessary to amend existing Acts the Councils, under the wise guidance of Maine, Fitzjames Stephen, Ilbert, Scoble and their successors, went on the lines of directly amending any Act which needed amendment, and avoided the method of making a new provision qualified by the words "notwithstanding anything contained in such and such an Act," and that of saying that a new Act was to be read as part of a group of existing Acts. The result is that the criminal procedure law of India is contained for all everyday purposes in one Act of some 560 odd sections, the Code of Criminal Procedure, Act V of 1898, as amended up to date, and whenever it has been at all seriously amended a new edition of it, as it now stands, is published by the Legislative Department. Far different is it in England, where there are at least three important Acts, those of 1848, 1879 and 1914, dealing with criminal procedure, besides a host of minor Acts. Again, the principal powers of the police in India are all to be found in the Police Act of 1861 and the Code of Criminal Procedure, except

in the towns of Calcutta, Madras, Bombay and Rangoon, for each of which exists a local Act replacing the Act of 1861 and parts of the Code.

Police Organization.—The foundation of the administration of an Indian Province for all primary purposes of government is the District. Districts vary in size and population, but there are many with areas round about 2,000 square miles, and populations round about 1,000,000. The head of each District is called the “Magistrate and Collector” or the “Deputy Commissioner.” He is the principal revenue and general administrator, the chief magistrate and the official superior of the Superintendent of Police (a rank somewhat corresponding to Chief Constable) in all matters relating to law and order. Districts may be grouped under a commissioner, who, except in a few backward tracts, is not the presiding officer of a criminal court, but otherwise is the administrative superior of the magistrates and collectors in his division. There are also deputy inspectors-general of police, and there is an inspector-general directly responsible to the Provincial Government. By exception, there are special and separate police forces in the towns of Calcutta, Madras, Bombay and Rangoon, but otherwise in each Province there is a single police force. In England and Wales the advantage of local control results in the existence of a large number of independent police forces, but modern methods have eliminated all serious friction between them.

Courts in England.—When we come to the courts the differences are still greater. In England and Wales, working downwards, there are the Court of Criminal Appeal (the judges of which also sit as Judges of Assize), Courts of Assize, the Quarter Sessions and the magistrates, with, for an area in and round London, the special case of the Central Criminal Court, which does to a certain extent Quarter Sessions work as well as assize work, without prejudice to the existence of Quarter Sessions Courts for North and South London. In many boroughs Quarter Sessions are held by the Recorder, who is a barrister, and may practise at the Bar during so much of his time as is not occupied by Quarter Sessions. In counties Quarter Sessions are held by an assembly of magistrates of the county, presided over by a chairman, one of themselves, who often is, but need not be, a trained lawyer. The House of Lords and the King’s Bench Division of the High Court of Justice also can consider criminal cases in certain circumstances. The Court of Appeal does not appear to have any jurisdiction in criminal matters.

Courts in Big Seaport Towns in India.—The towns of Calcutta, Madras, Bombay, Rangoon and to a certain extent Karachi, are exceptions from the general organization of the criminal courts in India. In them the High Court (called in Karachi the Court of the Judicial Commissioner) does the work which elsewhere falls to the Court of Session, the only courts below the High Court being those of magistrates. There is nothing corresponding to a Court of Quarter Sessions, and there is no Court of Criminal Appeal, the reason for all this lying in the fact that the High

Courts have "original jurisdiction," both civil and criminal, in those towns.

Courts in India Generally.—In India, outside those towns, there is a High Court at the head of the judicial administration of each Province. It has judicial and administrative control in a very real way, coming into the daily official life of the presiding officers of the courts below on the administrative side, over all courts in the Province. It combines those functions which in England are performed by the Court of Criminal Appeal and by the King's Bench Division on its criminal side. On the civil side the High Court occupies the place held in England by the Court of Appeal. Below the High Court is the Court of Session, the principal criminal court of original jurisdiction, to which commitment is made in every case of which a magistrate cannot properly dispose. Its senior judges have unlimited jurisdiction over crime, while the juniors do work not unlike that falling to Quarter Sessions in England. Each Province is divided into Sessions Divisions, each of which consists of one or more of the Districts already mentioned. The magistrate and collector, or deputy commissioner, of each district is district magistrate thereof, and is necessarily a magistrate of the first class. Under him are several magistrates of each of the first, second and third classes, over all of whom he has both administrative and judicial control. Most of the important work is done by salaried magistrates, as well as a good deal of the trial of petty criminal cases, in fact the work done by unpaid magistrates is only a fraction of the total in most parts of India. Of the unpaid magistrates some sit singly, but most of them in benches, and but few of these magistrates or benches have the powers of a magistrate of the first class. Salaried magistrates sit singly, except for the one purpose of trying small "inter-racial" cases.

Classes of Magistrates and the Classification of Offences in India.—The differences in the powers of the three classes of magistrates are of importance. The existence of a Penal Code makes the classification of offences possible. In the Criminal Procedure Code there is a Schedule, the Second, which sets out every offence punishable under the Indian Penal Code, and, following these, gives groups, according to their seriousness or otherwise, of offences under other laws, and specifies what court or courts can try each offence or group of offences. So we have offences triable only by the court of session, offences triable by that court or by a magistrate of the first class, offences triable by the court of session or by a magistrate of the first or second class and offences triable by any magistrate. The Schedule is a little more detailed than this, but the body of the Code gives the court of session power to try any offence under the Indian Penal Code. Also against each offence (or group of offences) it is shown whether the police can or cannot arrest and investigate in respect of it on their own authority, whether usually a summons or a warrant is the process originally proper for issue to a person accused of it, whether in respect of it bail is an absolute right or a matter of more

or less restricted discretion, and whether it is compoundable or not compoundable. The Indian system is obviously very different from that in England, where county and borough jurisdictions may overlap, and there is no co-ordinating judicial authority for each county. Also in England (subject to differences in the case of a non-stipendiary magistrate sitting alone, and to some fine distinctions between a petty sessional court house and an occasional court house), all magistrates have equal powers, and have a much smaller amount of judicial authority to sentence and to try than have magistrates of the first class in India. Details about both the criminal and the civil courts in India can be found in *The History and Constitution of the Courts and Legislative Authorities in India*, by Mr. H. Cowell, barrister-at-law.¹ And in the present writer's *The Trial of Criminal Cases in India*,² the systems of criminal courts are fully described in c. vi, and their appellate and revisional jurisdictions in cc. xxxi and xxxii. Finally, it may be noted that where a case requires commitment to the court of session or High Court, that case must be inquired into by a magistrate of the first class or by a specially empowered magistrate of the second class.

The Clerk of the Court.—In England the clerk of a magistrate's court is usually a solicitor, and often not a whole-time officer. In India there is no official with exactly corresponding duties, for all court officials in a salaried magistrate's court are whole-time servants of Government. The magistrate himself performs the more important of the duties which in England are performed by the clerk. His reader and his court clerks between them keep all records in good order—no simple task—write up the registers of the court, make orders under the court's supervision for such outgoings as diet-money, and make the full record of each deposition as it is given whenever the magistrate, if he has jurisdiction to do so, restricts his personal record to a substantial memorandum and the case is one where a full record is legally necessary. No fees are payable in India to the clerk of the court. In cases other than police cases in the strict sense of those words, fees are levied, but this is done by means of court-fee stamps, because the whole cost of the courts is borne by the provincial government, and not by municipal or district funds. Fines levied on conviction, in the absence of statutory provision to the contrary, are credited to the provincial government when realized. But in India in all classes of cases compensation can be awarded, out of a fine imposed on conviction, to an injured person, *e.g.* for bodily hurt, whereas in England compensation can be awarded only in cases of felonies which have resulted in loss of property, and then the compensation is an additional penalty imposed upon the person found guilty, and is not paid out of any fine imposed upon him, but is recoverable as if it were costs.

Issue of Warrant.—In England, as a rule, a statement on oath is necessary before a warrant of arrest is issued, but this is not so in India.

¹ Published by Thacker Spink & Co., of Calcutta.

² Published by the same firm.

If the case is one where a warrant should ordinarily issue, or if a summons has been disobeyed, or if there is otherwise reason to believe that a summons will be ineffective, the magistrate has discretion to issue a warrant.

Commencement of Proceedings.—The general administrative powers of the district magistrate have already been mentioned. He can distribute work and transfer cases, even while they are in progress, from one court to another. Similar powers on a smaller scale are possessed by sub-divisional magistrates placed in charge of sub-divisions of districts. So it is not necessary to empower every magistrate to take up cases *suo motu*. Such power to "take cognizance," as it is called, is conferred by the Code of Criminal Procedure on district magistrates and sub-divisional magistrates, and the provincial government and the district magistrate have certain powers to confer it upon other magistrates. When a court cannot take cognizance of a case, even though the case is one which it can try under the Second Schedule, the case can come to it only when sent down to it or transferred to it by the district magistrate or sub-divisional magistrate. Cognizance can be taken in any of three ways, on complaint, on police report, and on information otherwise received. In the last case the accused has the right to insist upon either commitment to a superior court or transfer of the case to a magistrate not prejudiced by the receipt of information, as it were, out of court. Police reports made after investigation are usually accompanied by the accused under arrest, or by his bond for appearance. When an individual comes to court to complain of an offence which he alleges to have been committed, such complainant has to be examined upon oath as soon as possible, and his statement is reduced to writing as it is made, even though his complaint has been made, as it usually is, in writing. If a complainant's good faith and reliability do not appear to be doubtful, and his statement (during the course of which the magistrate may and ought to examine him in order to clear up or to emphasize doubtful points) makes out a good case, a summons or warrant will issue for the appearance of the accused. But the court may remain in some doubt as to any of these points, and then it can either make or order a preliminary inquiry or investigation without bringing the accused before the court, or, if it thinks that there is no good case, it can dismiss the complaint. If it adopts the former course it will, on completion of the inquiry or investigation, have to decide whether to issue process or to dismiss the complaint. So far the procedure is alike in all cases, whether heinous or trivial. In England no reduction of the complainant's statement to writing is required, there does not seem to be any provision for a preliminary judicial inquiry, and a warrant may, though it has been held that it ought not to, issue in any case however trivial, whereas the Second Schedule of the Indian Code directs that in a very large number of cases a summons is the appropriate first process.

Statements by the Accused.—In England at a commitment inquiry

before a charge is drawn or a commitment order made, all the evidence already taken has to be read over to the accused, and the accused has to be warned before he is called upon to state his case, if he wishes to. In India each deposition has already been read over in the presence of the accused immediately after it was completed, and warning that what he may say can be used against him has to be given to the accused only when he is produced before a competent magistrate, before cognizance for judicial proceedings is taken, in order that a confession which he is stated to be willing to make may be recorded. Though the accused cannot go into the witness-box in India, yet, if there be any case against him, it is incumbent upon the court to examine him with a view to enabling him to explain away, if he can, circumstances appearing against him in the evidence. He is not put upon oath and is not bound to answer, and the questions and his answers have to be recorded in full, form part of the record, and can be taken into consideration.

Remands and Adjournments.—In England the limit of a remand, even if the person accused be on bail, would seem to be eight days, while in India there is no limit when bail has been allowed, and magistrates may remand to custody for fifteen days or less. The right to be allowed bail in minor cases does not seem clearly expressed in the English Statutes as it is in the Indian Code, and except in cases of treason the discretion of an English magistrate is rather wider in indictable cases than is that of an Indian magistrate in non-bailable cases. The Indian rules are simpler about the release of a person who is remanded to custody because he cannot produce bail at the moment, but finds it later.

Discretion to Discharge at Commitment Inquiries.—During a commitment inquiry a magistrate in India may discharge the accused, even before the conclusion of the case for the prosecution, if for reasons to be recorded he considers the charge to be groundless, but no such discretion is given by the English Acts. In India, the charge, which corresponds to the indictment, is drawn by the magistrate during the commitment proceedings, though, of course, no plea is then taken on it. In England the framing of the indictment seems to be a matter for the clerk of the crown at the assizes.

Offences and Offenders outside the Magistrate's Jurisdiction.—S. 22 of the Indictable Offences Act, 1848, is a masterpiece of obscurantist drafting. It purports to be but one sentence, but it contains over 800 words. Its object is to define the powers of justices in respect of offenders within their jurisdiction who appear to have committed offences elsewhere, and its clumsiness is exemplified by the fact that it wanders off into the question of how the expenses are to be met of a constable who may have to convey the person concerned to the proper jurisdiction. But the Act of 1848 gives to justices the power to commit for trial a person found within their jurisdiction who appears to have committed an offence elsewhere. The Indian Code treats such a case from two points of view. First, if a court at A has reason to believe that Z has committed an offence

within its jurisdiction, but is now within the jurisdiction of the district magistrate of B, it will send a summons or warrant, according to the nature of the offence, to B. Either can go by post, but a warrant can alternatively be sent by a constable whose duty it is to execute it. In such latter case the constable, arrived in the district of B, must, unless he finds that he must either act without delay or risk the escape of the person to be arrested, get the warrant countersigned by a magistrate or responsible police officer in that District. If the process goes by post the district magistrate of B will countersign it and have it served or executed just as if it had originated in his own court. Secondly, if a duly empowered magistrate is informed that a person within his jurisdiction has committed an offence which cannot be tried, under the rules as to place of trial, within that jurisdiction, but is otherwise one of which he could take cognizance, he can compel appearance before himself and make an inquiry. If there appears from that inquiry a sufficient case to go upon, he should send the accused to, or take security for his appearance before, a magistrate having jurisdiction where the offence can be tried. When a warrant is sent from one District to another in India, it does not have to be sworn to, as it would have to be in England.

Search Warrants.—In India the rules about search warrants are similar to those about warrants of arrest, and the power to issue them is a general one under the Code, and not one depending on different Acts. Only a district magistrate or a superior court can issue a search warrant for a thing in the possession of the postal or telegraphic authorities.

Indian Procedure in Magistrates' Cases.—As the range of offences finally triable by magistrates is much wider in India than in England, the Indian Code lays down two kinds of procedure for trials before magistrates, the simpler of these being for those cases in which the maximum sentence which any court could impose for the offence is one of imprisonment for six months or less, with or without fine, or of fine only, and for brevity, rather than descriptively, the two classes of cases are called "summons cases" and "warrant cases." In summons cases in India the discretion of magistrates as to issuing summonses to witnesses is absolute, in England magistrates are not to issue process unless both the evidence appears to be material and the witness appears unlikely to attend voluntarily. In a warrant case in India either side is in general entitled to get a summons issued for any witness, so long as it does not appear to be abusing this right, but of course the actual provisions of the Code and the discretions allowed to magistrates are not expressed quite so simply as in the above words. There is, in the absence of a provision in the law constituting a given offence, no time within which a prosecution must be instituted in India. Another difference in procedure is that in petty cases there can be an *ex-parte* hearing in England, whereas in India all proceedings must be in the presence of the accused, or in cases where a warrant is not issued, and in the discretion of the court, in the presence of his pleader. But there is provision for recording evidence in the

absence of a person who is proved to have absconded, and for its use upon the person's subsequent arrest or appearance, if the witness has meanwhile died or become incapable of giving evidence. In England any case instituted upon complaint is usually dismissed upon the failure of the complainant to appear. This rule holds in India only in summons cases, and in warrant cases which are compoundable or non-cognizable, and in these warrant cases only if no charge has been drawn. In all summons cases senior magistrates have discretion to stay proceedings, without either convicting or acquitting, for good reason.

Effect of Accused's Plea.—If the accused admits the charge at the commencement of a summary case in England the court has to convict him. In like circumstances in a summons case in India the court may convict him, but retains discretion to hear evidence, or to examine the accused to discover exactly what his plea amounts to.

Rebutting Evidence.—The prosecution in England has the right to call evidence to rebut any evidence given for the defence except upon the point of the accused's character. In India the prosecution has no such right. But the court has a wide jurisdiction and discretion to call further evidence or to recall a witness at any stage of a case, and should do so if anything material appears likely to be elicited. And at the end of a trial in India both parties have the right to comment on all the evidence on both sides.

Appeal and Revision.—There are numerous other differences between the procedures of courts of first instance in the two countries, but the more salient have now been enumerated. As to appeals, the advantage in the matter of simplicity is all on the side of India. No notice to the court of first instance is needed before appealing; the appeal of a person in jail has to be sent in by the jail superintendent, and has even to be written out for him in jail, if he is illiterate or desires to have it so written. The appellate court disposes of the appeal on the written record, which, even in what are called "summary trials," must contain a written account of the facts of the case, and in other trials has either the full record of all that was said by each witness or a substantial memorandum thereof or both. The appellate court of course can take additional evidence, or order it to be taken if it thinks it proper to do so. It can dismiss an appeal without having the Crown or the complainant before it, if the appeal seems to be baseless; but unless the appeal has come from the jail, and the appellant has no pleader, it must give the appellant or his pleader a hearing first. And if the appellate court thinks that the lower court has not handled the case well, or has missed possible points in it, or has erred badly in procedure, and is not satisfied that the appellant is actually not guilty, it can quash the conviction and order a retrial before the same or a different magistrate. A sentence passed on conviction following a plea of guilty can be impugned only as to its extent or legality in most cases. An appeal lies against any sentence by a magistrate of the second or third class, and against any sentence of imprisonment, or

large sentence of fine, by a magistrate of the first class. Except in a "summary trial" there must be a judgment in writing, both in first instance and in appeal, containing the questions for determination, the finding on each of them, and the reasons for the findings. Appeals lie on fact as well as on law, except, as noted, after a plea of guilty. Revision somewhat resembles the powers which the King's Bench Division can exercise on its criminal side. When exercising this power the High Court can do anything that an appellate court can do on an appeal from a conviction, and further can correct or modify any order passed in the case, and even, within the limits allowed by law, enhance a sentence. The High Court has also most far-reaching powers to transfer cases from one court to another, while they are in process of hearing. Revision will not be allowed on the application of a party who might have appealed, but has omitted to do so. The district magistrate and the court of session have minor powers in revision. They can point out errors which have been or are likely to be committed, and can order further inquiry when a complaint has been dismissed or an accused person has been discharged. There is a difference of great importance in India between a discharge and an acquittal.¹ And they can report a case to the High Court with a view to its being there dealt with in revision. In revision no order altering the position of an accused person to his disadvantage can be made unless he has had opportunity to be heard. Otherwise, in order to discourage applications over merely trivial errors, there is no absolute right to any party to be heard in revision. The lower court is not made a party to applications in revision. It should be added that there is much more finality about sentences passed by the presidency magistrates in Calcutta, Madras and Bombay than about those passed by magistrates elsewhere in India.

Right to Trial by Superior Court.—There are many cases in England where, although a magistrate can legally pass final orders, yet the accused can of right require to be committed for trial. Such right does not exist in India, where, however, there is the greater facility of appeal. What a magistrate in India has to consider is as follows: (a) is this a case which this court can finally try? (b) if so, can its gravity be met by this court's powers of sentence? and then, if either question is answered in the negative, (c) does a case against the accused appear on the evidence which a reasonable man might take to make out his guilt?

The Subject-matter of a Trial.—A lack of accord between the original information and the evidence, or the offence for which a conviction is had, does not vitiate a trial in India, though of course it lies heavily upon the prosecution to satisfy the court that serious differences are not an indication of original falsity. As to multifariousness, the Indian Code lays down in terms the circumstances under which two or more persons or two or more offences, can be dealt with at the same trial. The chief instances are, where offences form part of the same transaction, where

¹ See note on p. 67.

the accused are said to have acted jointly or in collusion, where one accused is principal and the other abettor, and where the same person is charged with not more than three offences of the same kind all committed within a period of twelve months. Subject to these rules, up to the framing of a charge (and none is needed in a summons case), the court can proceed in respect of any offence which appears made out by credible evidence. Unless there is a provision in the Criminal Procedure Code, or in some other law, to the contrary, any person can complain in India of any offence which he believes to have been committed, even if it did not affect him personally. There is no provision for a common informer recovering a penalty in respect of any offence. And complaints need not be drafted in strict legal language. Here it may be remarked that the word "maliciously" is not much used in the Indian Penal Code.

Arrests by Private Persons.—The right of the police to call on the public for aid in effecting an arrest is substantially the same in both countries. In England it is legal for a private person to arrest when a felony is known to have been committed (apparently whether the person arresting saw it committed or not) or to prevent or terminate a breach of the peace. In India a private person can arrest one who in his presence commits an offence which is both cognizable and non-bailable, or one whom he knows to be a proclaimed offender.

The Indian Evidence Act.—The law of evidence in India is embodied in the Indian Evidence Act, 1872, which was drafted by Fitzjames Stephen when he was Law Member of the Governor-General's Council, and repeats such broad principles as the presumption of the innocence of an accused person, the bar to leading questions in examination-in-chief and the exclusion of hearsay. The presumption of innocence is to be found in the rule that a party who alleges a disputed fact, or a fact not admitted, must prove it, and the rule against hearsay is expressed by saying that oral evidence must be direct. The rule that an accomplice is unworthy of credit unless corroborated appears as an illustration to s. 114 which sets out the nature of the general presumptions which the court may make. But the Act also expressly states that no particular number of witnesses is necessary to prove any particular fact, so that a court which is absolutely convinced that an accomplice is telling the truth can act upon his evidence, even though it be uncorroborated. All the High Courts have held that cases where this is proper are very rare indeed. In Scotland there is a rule that the evidence of one witness only does not suffice to prove a disputed fact.¹

Statements by, and Conduct of, Accused Persons.—In India, differing from the rule in England, the statement of one of several accused, if available against himself as a confession or examination in court duly recorded, may be taken into consideration against the others, but this does not imply that it carries any weight unless it is corroborated in one way or another. The conduct of an accused person is relevant

¹ Lewis, p. 246.

together with statements accompanying and explaining that conduct, unless these latter are expressly barred by some provision of the Act.

Various Points about Evidence.—In England a witness cannot be forced to incriminate himself, *e.g.* when being cross-examined with a view to damaging his character. In India he can be compelled to answer, but what he says cannot be used thereafter to prove his guilt of whatever he may admit. But the court has discretion to disallow a question where the amount of discredit is likely to be small in relation to the importance of the witness's evidence. Though no rule about the sufficiency of purely circumstantial evidence is laid down in the Act, courts in India follow in practice the same lines as do courts in England in acting or refusing to act upon such evidence when it is not supported by direct evidence. The Evidence Act, and other laws in India, enumerate things which the courts "shall presume" under appropriate circumstances. The English Larceny Act of 1916 makes relevant in a case of receiving stolen property the fact that other property stolen within the last twelve months was found in the possession of the accused. This would usually be irrelevant in India, and could be proved only if the accused raised the defence that the property with which the immediate charge is concerned came into his possession accidentally. It would then be relevant in showing that the possession was intentional rather than accidental. But a person can be tried at one trial in India on three charges of the same offence, for instance three thefts, or three receipts of stolen property, provided that all occurred within the space of one year. There are some other presumptions raised in the English Larceny Act which could not be made in India.

Confessions.—If it is desired to prove a confession said to have been made by an accused person, in England, in Scotland and in India, the principal question is whether the confession is free and voluntary, or whether it was obtained by some inducement, threat or promise. If the court or jury comes to the conclusion that a confession made to a police officer was free and voluntary, and if it was made after due warning was given to the accused, then in England the confession can be used in evidence and acted upon. The Prisoners' Testimony Act provides, indeed, that if an accused person does not put himself into the box as a witness, counsel for the prosecution is not to comment on his failure to do so. But the law is well known, and the jury are bound to infer that if a man does not go into the box he must have something to conceal. Therefore by far the greater number of accused persons realize that it will be best for them to go into the box and give some account of the matter, and they also realize that it will be to their advantage to give that account at the first possible opportunity, consequently the Act has made confessions and incomplete admissions of facts on which the prosecution is based, made to the police at the outset of the investigation, much more common than they used to be. In India an accused person is examined by the court, but cannot give evidence as his own witness. Apart from

the lawful tender of a pardon by a magistrate empowered to make such a tender, the holding out of inducements, threats or promises by the magistracy or police to accused persons is forbidden by the Indian Code of Criminal Procedure. And the Indian Evidence Act provides that a confession obtained by an inducement, threat or promise of a temporal nature held out by a person having authority over the accused is absolutely inadmissible. And a confession made to the police or while in police custody, unless formally made to, and recorded by, a duly empowered magistrate is, with one exception, inadmissible in India. So, though the Indian case law on confessions is large enough, it does not contain cases, as does the English law, where, after arrest, an accused person has made statements on the advice of an employer, parent or schoolmaster. The conduct, silence and so on, of an accused person is relevant and admissible in India when it took place before his arrest. And, as an exception to the general rule about confessions while in police custody, anything said by the accused to the police, or while in police custody, which leads to the discovery of other evidence is admissible in India. The admissibility is limited to so much of the statement as leads to the discovery. And in India there are cases, mostly of homicide for revenge or on account of sexual jealousy, where an accused person gives himself up to the police, coming to the police and stating in a formal report, the first intimation the police have of the crime, what he has done. The informant is not then in police custody, and his conduct in coming and giving himself up is relevant as the conduct of a party to the case relating to the facts in issue, and his statement accompanying and explaining that conduct is therewith admissible, even if it is a full confession. Conversations between accused persons while in custody are admissible in England, but not in India.

Confessions to Magistrates before Trial or Inquiry.—In India if a person admits his guilt to the police and appears ready to repeat his admission before a magistrate he ought to be produced as soon as possible before a magistrate empowered to record confessions. If the magistrate can place him for the time in custody other than that of the investigating police it is best to do so. He must then warn the accused that he is not bound to speak, and that what he says can be used in evidence against him, and must further satisfy himself that the accused is prepared voluntarily to make a statement. What the accused then says must be recorded in full, together with a full record of any questions which the magistrate puts to him. If the full record is made by a clerk, then the magistrate must make a substantial memorandum himself as the statement and examination go on, with his own hand. When the record is complete it is read over to the accused, and can be corrected, and the final record must be signed by both the magistrate and the accused, and the magistrate must append to it a certificate in a set form reciting the warning given, the magistrate's belief that the statement is voluntary, and the truth and fullness of the record. A confession so taken can be used at any time against the person who made it.

Confessions in Scotland.—I am indebted to Mr. W. J. Lewis's *Manual of the Law of Evidence in Scotland*¹ for my ability to refer to the Scots Law as to confessions. The law in India on this point is nearer to Scots law than to English law. What is admissible against an accused person in Scotland in the first place is his formal written declaration, which must be taken after the accused has been produced before a magistrate, and before "service of the libel," this last apparently the formulation of a written charge instituting formal proceedings. The declaration is not taken on oath, as in India, and has to be authenticated by the signatures of the accused and the magistrate. And, here going further than the Indian Code, the signatures of two witnesses in whose presence it was taken are also required. It must not be taken in open court. In India it may but need not be. Only the magistrate, his clerk, the procurator-fiscal, the accused, his agent, and the two witnesses may be present in Scotland. The accused before he speaks is to be warned that he may consult his agent before deciding to speak. If he has no agent present, a warning similar to that prescribed in India must be given. The magistrate must assure himself that the confession is voluntary, and must keep off threats and persuasions from the accused, and he alone may question the accused. Differing herein from the Indian Code, the Scots Law forbids the use of the declaration against the accused in case of the charge against him being subsequently enhanced. Confessions to the police are admissible in Scotland if they are volunteered to the police by a suspected person at the time of his arrest, or before he is arrested, even if no warning has been given to him. But confessions made while under detention after arrest and before commitment to jail, either in answer to questions or on promise of safety, are inadmissible if the accused appears to have been questioned, pressed or unfairly treated. In general confessions and statements made after arrest, except those taken in the formal way already described, are invalidated because they are in the nature of "declarations," yet have been irregularly taken. After commitment to jail confessions to police or prison officers are inadmissible unless they are both volunteered, and persisted in after due warning. If a prisoner desires to say anything at this stage, then, as in India, it should be formally recorded by a magistrate. Inducements, threats or promises held out to the accused by a person in authority have much the same effect in invalidating confessions in Scotland as in England and India.² Scots law differs from that of India in making even the declaration of one co-accused before a magistrate, much more his less formal statements, inadmissible against the others, and the jury must be warned accordingly. As in India and in England, so under Scots law statements and actions of the accused before the offence was committed are relevant if they relate to the facts in issue, *e.g.* if they show intention, malice or state of mind generally in respect of the person injured.

¹ Hodges, Edinburgh, 1925.

² Lewis, p. 320.

Pardons.—In England the power to tender a pardon belongs to the public prosecutor acting for the Crown, though where evidence is altogether insufficient it does not appear illegal for magistrates to discharge an accomplice and then call him as a witness. In India district magistrates, and other senior magistrates, may tender pardons in heinous cases. In Scotland it appears to be open to the prosecutor, who in serious cases is a public officer, to refrain from indicting any person, and then to call him as a witness. If a person has already been accused of some crime, and convicted and sentenced or acquitted, in all three countries he is available as a witness against others accused of the same crime or of one belonging to the same series of transactions. So, if one of several jointly for trial pleads guilty at the outset, he can thereupon be convicted and sentenced, and then used as a witness.

The Defence.—In England and in India the accused cannot be compelled to state anything as to the nature of his defence until the close of the case for the prosecution at his final trial, though if he has elected to give evidence, in England, or to answer the questions put to him by the magistrate, in India, at the commitment inquiry, the main lines of his defence will be known. But in Scotland certain lines of defence are known as "special defences" and notice of them has to be entered upon the record of the formal trial at the first hearing.¹ These special defences are alibi, that some other person is actually guilty (in which case that person must be called, or his unavailability as a witness proved) and self-defence. In the last-named case the threats or actual conduct intended to be proved must be specified in the notice. So also if it is intended to prove that an injured person is of a quarrelsome disposition, or that the prosecutrix in a case of rape is of immoral character.

Dying Declarations.—"Dying declarations," described in the Indian Evidence Act as "statements, written or verbal, of relevant facts, made by a person who is dead, as to the cause of his death, or as to any of the circumstances which led up to his death," are differently treated in each of the three countries. In England they are admissible only in criminal cases in which the cause of the death or the person who caused the death is in dispute, and it is required that the declarant at the time of making the statement had a settled hopeless expectation of immediate death. Where a note on the record showed that the declarant said that he had no hope "at present" of his recovery, the statement was ruled out.²

In another case the deceased's doctor told her that she was in imminent danger and that she had no hope of recovery, apparently a strong enough instance. Questions were put to her and her answers were recorded in substance, but not verbatim. This was rejected both because there was no proof that she was in expectation of imminent death and because the record made did not contain her exact words.³

In Scotland the formal deposition of a witness, even in the accused's

¹ Lewis, pp. 311, 312.

² *R. v. Jenkins*, L.R. 1, C.C.R. 187, 33 J.P. 452.

³ *R. v. Mitchell*, 56 J.P. 218.

absence, who has died before the diet of trial is admissible on either side. But it must have been made freely and voluntarily, and the deponent's life must have been endangered. Thus it is not necessary that the deponent must himself have been in expectation of imminent death. Such a deposition should be taken in the presence of a magistrate, and the magistrate, and the deponent if able to, must sign it. Statements made by a deceased person not in such a formal way may still be admissible in accordance with ordinary rules, but the circumstances in which they are made are material. These, for instance, may show that a statement was part of the *res gestæ*. A further condition of admissibility is that the deponent must have believed that his life was endangered, but not necessarily that he was dying. If the statement was recorded in a "precognition," that is a preliminary legal and formal though non-judicial investigation, it is not available in evidence as part of the precognition, but the clerk who has taken down the statement can depose to its contents, using the record to refresh his memory.

In India "dying declarations" can be used in civil as well as in criminal cases; thus in a civil suit about a road accident, what an injured person, subsequently dead from his injuries, said about the accident could be put in evidence. All that is necessary is that the case should be one in which the cause of the person's death comes in question. And the Indian Evidence Act enacts: "Such statements are relevant whether the person who made them was, or was not, at the time when they were made, under expectation of death." Thus India allows greater latitude in respect of dying declarations than does Scotland, and Scotland allows greater latitude than does England. Fifty years' experience in India has shown that the greater latitude helps, and does not hinder, the doing of justice. An investigating police officer, a surgeon, a magistrate salaried or honorary, or other responsible person, is naturally expected by the courts to take and record such statements with due care. If the statement is recorded by a magistrate having jurisdiction to hear the case against the accused, in the presence of the accused, and the latter can cross-examine, the record proves itself, but otherwise the person who recorded the statement must depose to having heard and recorded it, and to the contents of the statement, refreshing his memory, if necessary, from the record. But it may be that the only evidence of a dying declaration is that of an illiterate person who heard the deceased speak before he became unconscious, or that for some other reason no record could be made before death ensued, though there is evidence of words spoken by the deceased. In that case the person or persons who heard or say that they heard the dying person's statement must be called as witnesses to depose to what they heard him say. The witnesses will be open to cross-examination to test both their accuracy and their possible partiality or prejudice. It will be for the court or the jury to decide whether they ought to be believed in whole or in part, and, if they are worthy of credit, to form a conclusion as to what the effect of the dying person's statement was.

Note on Discharges and Acquittals.—S. 403 of the Code of Criminal Procedure sets out the legal result, by way of barring further proceedings, when “a person has once been tried by a court of competent jurisdiction for an offence, and convicted or acquitted of such offence.” An explanation to the section runs: “The dismissal of a complaint, the stopping of proceedings under s. 249, the discharge of the accused or any entry made upon a charge under s. 273, is not an acquittal for the purposes of this section.”

When a charge has been drawn in a “warrant case” tried by a magistrate the case must end in a conviction or in an acquittal. And when a person has been committed for trial before the court of session or the High Court the trial must end in one or other of those ways, except where, in a High Court only, the judge considers that the charge or any part of it is unsustainable and makes an order under s. 273 to that effect. In a “summons case” tried before a magistrate, unless in the rare case of a stoppage of proceedings under s. 249, the end of the trial must be a conviction or an acquittal, because no charge is formally drawn in those cases, a verbal statement of what he is accused of having done being made to the accused at the outset of the judicial proceedings to replace a formal charge. But if the prosecution fails to make out a case, or breaks down while its evidence is being heard, in either the trial of a “warrant case” or the proceedings in a commitment inquiry, the accused is discharged. When a magistrate has dismissed a complaint, or discharged the accused, the district magistrate or the court of session can order further proceedings in the exercise of jurisdiction in “revision” under c. xxxii of the Code of Criminal Procedure. This can be done *suo motu*, or upon application. The High Court also has this, and more extended, jurisdiction in revision. An acquittal can come before a superior court only when the local government appeals against it to the High Court, or, sometimes, in revision. When the local government appeals, the High Court, if satisfied that the acquittal is wrong, can alter it into a conviction, or can quash it and order a new trial. In revision it is possible for an acquittal on appeal, where the district magistrate or court of session has reversed a conviction, to come before the High Court. Then the High Court can indeed quash the acquittal and order a rehearing of the appeal, but it cannot convert the acquittal into a conviction, unless the local government has also appealed against it. The writer has heard of cases where private persons have, in revision, moved the High Court to set aside an original acquittal by the court of session and to order a new trial.

THE PRESENT STATE OF FRENCH CASE-LAW WITH REGARD TO DAMAGES FOR BREACH OF PROMISE OF MARRIAGE.

[Contributed by Dr. P. O. LAPIE, *Avocat à la Cour de Paris*, and translated by A. W. BLAIR, Esq., LL.B.]

Bibliography.—The available material on this subject is somewhat scanty and generally not of recent date. The chief sources are :

A. Colin, Thèse, Paris 1887. *Des fiançailles et promesses de mariage.*

G. Vidal, *Études sur les mesures organisées par la loi et la jurisprudence pour protéger les fiancés contre leurs fraudes réciproques.*

Colin & Capitant, *Traité de droit civil*, tome 2, p. 128.

Contract to marry not Enforceable.—Freedom to contract implies absolute liberty of consent as between the parties.

The validity of such an important contract as that of marriage—owing to the period of its duration (as, in theory at least, it should last for the life of each party), to the solemnity of the moral obligations it imposes and to the irrevocable nature of the obligations flowing from it—depends of necessity upon the absolute freedom with which each party has entered upon the contract.

At the present day French law interprets this idea in an extremely rigorous fashion ; indeed it considers that the parties cannot, by a contract prior to marriage, bind one another to enter upon it. No valid pact results from the mere promise to marry. The contract of betrothal is unknown to our law.

It would be contrary to the rule of public policy concerning the freedom of marriage that a man should contract to marry by giving a sort of consent precedent to marriage which would operate as a restraint upon his own free will and oblige him to carry out such marriage.¹

Breach of Promise of Marriage not *per se* a Ground for awarding Damages.—Since promise of marriage does not bring about any betrothal contract, the breach of such promise is not equivalent to a breach of contract. In consequence no damages are exigible for the mere fact

¹ Our old law recognized the betrothal contract (*contrat de fiançailles*) as an outcome of the Canon Law with much the same characteristics as in German law at the present day (Code, Arts. 1297-1302) and in the Swiss law (Code, Arts. 90-95). It was very much of a moot point to know whether the *Code Napoléon* had abrogated this system. Since 1838 judicial decision has ruled upon the matter as indicated above ; cf. Cassation Civile, May 30, 1838, Sirey 1838 . 1 . 492. Also Cass. Req., November 12, 1901, D.P. 1902 . 1 . 46, Sirey 1902 . 1 . 237.

of having broken a promise of marriage or for not having given effect to the betrothal; there is no obligation to perform what one cannot perform. It is not a question of an obligation to which one of the parties has bound himself as in the realm of contract: the other party does not then require to bring action for damages by reason of the first failing to perform. Breach of the marriage-promise does not automatically and by itself alone entitle the person to whom the promise has been made to succeed in damages.

Breach must be Wrongful and cause Damage.—Something more is necessary. This additional factor, the element necessary to justify allocation of damages, is tort. In order that the deserted fiancée may obtain damages from her inconstant or irresponsible lover, the latter must have committed some wrong which has occasioned loss to her; it is on account of this loss caused by the wrong that the deserted party will be able to sue for reparation. To put it otherwise, the liability is not founded on contract but on a quasi-delict or tort.

The most recent case which may be regarded as aptly summing up the law on this point is the decision of the Civil Chamber of the Court of Cassation of date March 2, 1926.¹ The non-execution of the marriage promise, says the decision, does not constitute a breach of contract; but the refusal to carry out a marriage can, according to circumstances, "degenerate" into a fact entitling an action for damages, obliging the individual who has occasioned the wrong to make reparation.

The judge must establish the extent of the wrong in order to condemn in damages.

We shall here attempt to establish the elements of the wrong which would lead to an action wherein damages would be awarded.²

¹ Dalloz hebdomadaire 1926 . 2 . 86. But see one isolated decision to the contrary: Colmar, March 29, 1922, *Revue d'Alsace-Lorraine* 1922, p. 504.

² We deliberately leave aside in the text a question which is important in actual practice, but the outlining of which would take us outside the limits which have been ascribed to us: that of Proof.

In our old law the burden of proof of the justification for the breach was incumbent on the fiancé who broke the promise: without which he was summarily condemned. Under the new law it is the party who has suffered detriment that must establish that he or she has been the victim of a heartless flirtation or malicious intention, a wrong which imports liability according to Art. 1382 of the Code Civil.

If one is to be guided by the practice of some Courts, the existence of the promise to marry must be proved by written evidence, or at the very least by first of all setting up proof by written document and then completing by oral testimony. Grenoble, February 2, 1897, D.P. 1898 . 2 . 57.

Chateaulin, February 17, 1926, *Gazette du Palais* 1926 . 2 . 28.

Riom, November 15, 1920, *Gazette du Palais* 1926 . 1 . 14; Dalloz 1921 . 2 . 39; Sirey 1921 . 2 . 87; or again, it is necessary that the deserted party should show the impossibility of bringing a written proof. Cassation Civile, December 2, 1907. *Gazette du Palais* 1907 . 2 . 591. Sirey 1909 . 1 . 553; Note Hémar. Dalloz 1908 . 1 . 201. Cass. Req. February 10, 1909, *Gazette du Palais* 1925 . 1 . 131.

The Court of Cassation has in this respect generally been followed by provincial and subsidiary courts. Tribunal de Rouen, March 22, 1927. *Gazette du Palais*

Illustrations of Wrongful Breach of Promise. (a) *Seduction*.—The case most frequently met with in practice is that of physical intimacy on the strength of a promise of marriage—such happenings as would in Scots law establish “marriage subsequente copula,” where the copula take place on the faith of the promise.

A man induces a young girl or woman to indulge in intimacy by promising marriage, and afterwards deserts her.

(b) *Other Cases of Damage*.—But, however frequent this instance may be, it is not the only one, and though we shall often refer to it, we do not overlook the other two principal cases: the breach of the betrothal agreement¹ and the refusal to celebrate a civil marriage (this being the only valid ceremony in the eyes of French law) after the celebration of the marriage in church.²

This observation³ once made, we are free to determine the factors which under French jurisprudence constitute the actionable wrong.

First of all we find an act, the cause determining certain moral or material considerations, which marriage would have regularized and which as a result of its non-celebration prejudices the position of the deserted party.

Where, for example, the promise is the cause determining the seduction or where it involves the parents of one of the parties in certain expenses or creates a state of affairs advantageous to one of the betrothed parties, the necessary act is constituted.

Where the fiancé goes back on his promise—abandons the girl he has seduced, perhaps leaving her with a child, or deserts his young bride in her new home and by his departure injures her reputation—then the

1927. 1. 718, with note and references. Tribunal de Marseille, April 6, 1927, *Gazette du Palais* 1927. 2. 226.

Certain decisions admit that this impossibility is the normal case and ought to be presumed, when proof at large could then be employed. Besides, as the action is based on Art. 1382, proof by witnesses ought to be allowed at any stage of such cases. Cour de Poitiers, March 28, 1927, *Gazette du Palais* 1927. 2. 226.

In this complicated sphere we should really distinguish two kinds of facts which correspond to the two types of proof: for material facts, such as the facts of seduction, proof at large can be brought. See Lyon, October 26, 1923, *Gazette du Palais* 1924. 1. 78. To show the probability of the material facts (especially in the case of seduction) resulting from a promise of marriage, oral testimony is regarded as secondary to the beginning of proof by written document. Limoges March 17, 1924, *Gazette du Palais* 1924. 2. 31, *Gazette des Tribunaux* October 19, 1924.

¹ Douai, December 18, 1923, *Recueil Douai* 1924. 126; Tribunal Civil de la Seine, March 6, 1923, *Gazette des Tribunaux* May 5, 1924; Nancy, June 16, 1920, *Gazette du Palais* 1921. 1. 47; Seine, March 25, 1920, *Gazette des Tribunaux* June 11, 1920.

² Paris, July 9, 1924, *Dalloz hebdomadaire* 1924. 1. 608; Montpellier, March 24, 1927, *Moniteur judiciaire du Midi*, July 15, 1927.

³ Let us insist on its importance: if our study were limited to the case of *Séduction*, we should be led to infer that the action for breach of promise could only be brought at the instance of a female plaintiff against a male defendant. It is by no means so: we meet cases where a male plaintiff raises the action for breach of the wedding engagement. Seine, March 6, 1923, *Gaz. Trib.* May 5, 1924.

damage arises. And the wrong consists in having occasioned damage by withdrawing without reasonable cause from the performance of those obligations implied from the initial act and by thus refusing to shoulder the responsibility for its consequences.

Promise must precede Wrongful Act.—For the promise to be considered as determinative of the facts causing damage, it must in the first place have been made in a very definite fashion, and in the second place (and this is more important) it must have been made before the occurrence of the wrongful act. The wrong can be aggravated if the age and position of the promisor are such as to give the promise more weight, and are calculated to inspire a greater sense of security and confidence in the other party.

As for the definite character of the promise, we have shown in our long preliminary note how it is often very difficult and even delicate to bring proof of this kind.

Impossibility of Proof in Writing.—Generally speaking, it is impossible to produce a document in writing ; not simply because the alleged seducer cannot write,¹ but rather that, in these matters, chiefly concerning cases of seduction, it is seldom that anyone who had the design of deserting a girl would be so lacking in prudence as to make written promises. It should also be pointed out that written documents do not, properly speaking, constitute proof of the promise ; but the beginning of the proof or a partial proof—as, for instance, where the parties have indulged in terms of extravagant endearment when corresponding to one another by post card.²

Proof thus begun can be completed by the testimony of witnesses. The circumstances of the case sometimes demonstrate the impossibility of a woman being able to produce written evidence—as in a case³ concerning countryfolk who had the habit of “frequenting” each other’s abodes.⁴

Under such circumstances a formal promise of marriage is considered as a fraudulent act vitiating the consent of the party to whom it has been made⁵—the parties could not honestly have been *ad idem*.

Intimacy freely consented to is not Seduction.—Whence it has been laid down that if the intimacy were only the result of mutual weakness and reciprocal desire, the claim for damages must be dismissed,⁶ and the

¹ Marseille, April 6, 1927, *Gazette du Palais* 1927 . 2 . 226. Claim for 500,000 fr. : judgment on the question of sufficiency of proof has not yet been pronounced.

² Limoges, March 17, 1924, *Gazette du Palais* 1924 . 2 . 31.

³ Cour de Poitiers, March 28, 1927, *Gazette du Palais* 1927 . 2 . 226.

⁴ Claim for 10,000 fr. Decree for 5,000 fr.

⁵ In the absence of fraudulent misrepresentation, recklessness or blameworthy imprudence on the part of the alleged seducer is regarded as a wrong entitling the woman to damages.

⁶ Paris, February 25, 1921, *Gazette des Tribunaux* July 17, 1921.

same rule applies *a fortiori* if the woman has yielded herself of her own free will.¹

Further, it has been stated in a case at Poitiers, February 13, 1923,² but here under different circumstances, that the tort is much more definite and serious where the seducer has made use of arguments about his mature years and his respectable mode of employment, and has expressed the hope of bettering his position in order to give more weight to his promise, *e.g.* where a carrier declared he was about to become an innkeeper³ and where an army doctor induced the wife of a private soldier to divorce her husband.⁴

There was a similar case at Rennes on October 20, 1924.⁵

Promise must precede Wrongful Act.—If the promise is to give a right of action, the second condition is obviously this, that it must have been given before the occurrence of the events, in particular before the acts of seduction happened.

Thus a promise of marriage made during pregnancy, even if proof of it is adduced by publication at the "mairie" of the future spouse's domicile, does not when it is broken off justify the allocation of damages.⁶ So also where a married man and father of a family made such a promise after physical intimacy had taken place.⁷

Even when such promises have been definitely and formally made their being given subsequent to the intimacy invalidates them.⁸

Such are the two constituent conditions of the wrongful act. Nothing can undo this wrong, and indeed the fact that a woman has betaken herself to a disorderly mode of life after the immoral relations, far from being an answer, will rather be considered as an aggravation of the wrong on the part of the individual who by his deeds and his fallacious promises has set her upon the downward path.⁹

It might be remarked here that the liability of persons having minors under their guardianship cannot be invoked if they have been unable to keep a check on the conduct of the latter despite sound advice given,¹⁰

¹ Paris, December 17, 1920, *Gazette des Tribunaux* February 28, 1921. But see Marseille April 6, 1927, *Gazette du Palais* 1927. 2. 226. Even where there is no breach of a fiduciary relationship, the woman should not have to suffer the consequences of this act alone. This is equitable doctrine, but it is regarded as very "advanced."

² *Gazette du Palais* 1923. 1. 579.

³ Claim for 20,000 fr. The amount awarded is not given in the Reports.

⁴ Tribunal Civil, Bordeaux, December 12, 1922; *Gazette du Palais* 1923. 1. 269, Dalloz 1923. 2. 244. 20,000 fr. with interest on the usual legal scale from the day when claim first raised.

⁵ *Gazette du Palais* 1927. 2. 226.

⁶ Seine, November 16, 1922, *Gazette du Palais* 1923. Claim for 50,000 fr.

⁷ Lyon, June 7, 1923, *Moniteur judiciaire de Lyon* December 3, 1923.

⁸ Tribunal Civil, Bourges, December 14, Loi December 23, 1920.

⁹ Montpellier, February 5, 1923, *Gazette du Palais* 1923. 1. 578.

¹⁰ Parent and Child . . . Nice, November 19, 1923, *Gazette du Palais* 1924. 1. 185.

or if in the domestic establishment they have acted according to the custom of the place.¹

Estimation of Damages.—Having completed our examination of the wrong from the legal aspect, it now remains for us to consider the most up-to-date analysis of the damage or loss.

To have a claim for reparation, there must be damage.

Thus an individual who has gone through the Church ceremony of marriage in Havannah in order to enhance his business prospects is not entitled to claim damages from a Frenchwoman with whom a state-marriage was to have been celebrated later on and who refuses to join him in France.²

Moral Damages.—The damage caused can be of either a material or a moral order.

The moral prejudice is generally to be seen in the discredit caused to the reputation of the promisee. For instance, a woman married according to the rites of the Church and who has not succeeded in having her marriage regularized by the civil ceremony has long possessed the status of a married woman and must, however painful it may be to her, resign herself to not obtaining it in law: she is entitled to damages.³ Action for damages will also lie if after taking advantage of a young girl's favours breach occurs under conditions which expose her to public scorn and place her in a very awkward position.⁴

The right of action again arises when the fiancé suddenly withdraws his promise on the eve of the marriage ceremony, claiming that he has not been informed until that moment of the moral and financial position of his intended bride, whilst in point of fact he had been so informed beforehand.⁵

Other examples of moral prejudice or loss are to be found in the following cases: The breach causes the fiancé to lose his employment in a bank.⁶ A man alleges a futile motive of such a nature as to throw suspicion on the real reason for the breach "that there is a war on, and that in October 1915, when he made the promise he was led to believe that it would never finish."⁷ Such is also the case even if breach occurred after long discussion and on the advice of the defendant's family.⁸

So it may be said that moral prejudice or loss is that which has been

¹ Master and Servant . . . Louhan July 22, 1921, *Recueil Dijon* 1921 . 125.

² Paris, July 9, 1924, *Dalloz* h. 1924 . 608.

³ Montpellier, March 24, 1927, *Moniteur judiciaire du Midi* July 15, 1927.

⁴ Tribunal Civil de Lyon, February 21, 1924, *Moniteur judiciaire de Lyon* May 2, 1924.

⁵ Douai, December 18, 1923, *Recueil Douai* 1924 . 126.

⁶ Seine, March 6, 1923, *Gazette des Tribunaux* May 5, 1924.

⁷ Nancy, June 16, 1920, *Gazette du Palais* 1921 . 1 . 47, and also Seine, March 25, 1920, *Gazette des Tribunaux* June 11, 1920: 10,000 fr. awarded for moral prejudice; 4,000 fr. to compensate for expenses necessarily incurred in setting up house.

⁸ Orleans, March 4, 1921, *Gazette du Palais* 1921 . 2 . 63: 50,000 fr. claimed; 20,000 fr. obtained. Here there was an additional consideration; prejudice taken note of as caused by communication of a venereal disease.

caused to the detriment of the other party's social position and reputation by the first party withdrawing his or her promise.

Material Damages.—Material loss or prejudice is that which results from some change in the material situation: the promise of marriage has induced the deserted party to make certain expenses or has made him or her take on heavy liabilities; both of these would have been covered by the marriage. The non-celebration of the marriage makes them still more grave.

The most usual type of case is that concerned with the offspring of girls seduced by promise of marriage and then abandoned.¹ There are, however, two things which ought to be distinguished. Just as we distinguish between the action seeking to establish paternity and the ordinary action of breach of promise, a distinction which makes the study and exposition of the law on the subject a very delicate task, so we have also to draw a distinction between, first, an Order for payment of aliment proportionate to the cost of maintaining the child and, second, damages for breach of promise of marriage.

The existence and the age of the child are properly considered in fixing the amount involved, but must not prejudice the question of affiliation.²

Conclusion.—The majority of the references we have been able to give support this theory.³

On every occasion possible we have attempted to give a footnote as to the amount of damages awarded to the plaintiff. From the reports of decided cases it is difficult to bring out exactly what factors have most influenced the judges, for they have made use of their power of discretion: in coming to a decision they are generally guided by considerations affecting the social and financial position of the parties. It is rather a difficult task to find the facts by an exploration of the law reports.

In concluding this article, we have arrived at a point where we can corroborate the statement made in a judgment of the Court of Cassation referred to at the beginning hereof. Breach of promise of marriage is not equivalent to a breach of contract automatically involving the award of damages. Damages are only given to the injured party if she can prove that the fiancé or seducer has by withdrawing his promise committed a tort and has caused her moral or material loss.

If we disregard one or two conflicting cases, we may safely say that such has been the general trend of French judicial decision on this point during the last few years.

¹ See on this question of expenses incurred by intending spouses in setting up domestic establishment, Seine, March 6, 1923, *Gazette du Tribunal* May 5, 1924.

² Cour de Montpellier February 5, 1923. *Gazette du Palais* 1923.1.578: 5,000 fr. and 100 fr. monthly, it being laid down by the Court that this monthly payment was by way of damages and not an alimentary provision for the children.

³ We might add: Nantes, December 13, 1922, *Gazette du Palais* 1923.1.478; Claim for 20,000 fr.; Lyon, January 23, 1907, D.P. 1908.2.73; Cassation Requête, July 17, 1911, D.P. 1915.1.52; Mayenne, January 9, 1914, D.P. 1915.5.8.

THE LEGAL DEVICE IN JEWISH LAW.¹

[Contributed by BERTRAM B. BENAS, ESQ., B.A., LL.B., of the Middle Temple, Barrister-at-Law.]

THE method of the circumvention of an existing law or the institution of a novel legal incident, either by way of principle or of procedure, has so largely found place in the two great jurisprudential systems of Occidental civilization, the Common Law and the Civil Law (*i.e.* the *Corpus Iuris Civilis*—the Roman Law), that a technical term exists for its description. The *fiction* of the Roman and the “fiction” of the English lawyers recur with sufficient frequency in the legal histories of both systems to emphasize the fact that the process of the device of legal circumvention is not a monopoly of the Jewish jurists. Whatever may be the connexion between the Jewish and the Roman *corpus juris*, certainly none can decline to admit that the soil of Occidental civilization, from pre-Justinian periods down to the nineteenth century, was singularly congenial to the cultivation of a flourishing growth of refined legalisms. The disputations of the Schoolmen point clearly to the fact that this nomism which dominated the legal systems was no isolated phenomenon, but an element rooted deeply in the sources of the culture of the prevailing intellectual powers of Europe. The comparative study of jurisprudence shows that neither in an elaborate system of hermeneutics, nor in the methods of the legal device of circumvention, nor in the all-pervading spirit of nomism, the Jewish law stands alone, but partakes of phenomena so regular in the parallel systems of the Occident that it would seem to point to its incidence as an integral element in the development of law, and through law, of civilization—not perhaps essential in the abstract, but necessary through the eventualities of the historical evolution of civilization. In viewing the system of Jewish law from the standpoint of comparative jurisprudence, regard must be had to the fact that the conditions under which Jewish law for long existed, as with every other phase of Jewish life, are singular and distinctive. The endurance of the Jewish people as a cognizable entity, together with their detachment from a Jewish political sovereignty, gives to the history of their law a specific form of evolutionary nomism, distinguished in method, both as to substantive and adjective law, from those systems possessing in themselves a coercive jurisdiction under which the progress

¹ Paper read before the Society for Jewish Jurisprudence in the Inner Temple on July 18, 1927.

of the law is ensured by an enforcing judiciary with the sanction of supreme authority. With other legal systems, legal development is worked out upon the indigenous or adopted soil and with the sphere of jurisdiction definite and ascertained.

Although Jewish law has been severed from a political entity living by its law, the system has developed partly through the occasional delegated jurisdictions given to it, to be administered without review so long as it acted *intra vires*, but chiefly by means of the automatic sway which the cohesion of Jewish settlements and the voluntary submission to its decisions secured for it. The chain of interpretation has extended to the present day, and it is because of the principles upon which the interpretations are based that, from the point of view of jurisprudence, they have legal value.

The term "legal fiction" has been applied in jurisprudence to the assumption that a rule of law remains unchanged, and the fact that it has undergone amendment being either explicitly omitted from observation, or, if admitted in effect, it is theoretically regarded as unmodified. Maine observes ¹:

The fact is . . . that the law has been wholly changed, . . . the fiction is that it remains what it always was. . . . It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for . . . improvement which is not quite wanting; at the same time they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law. . . .

We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law.

Blackstone, in referring to legal fictions, remarks ²:

And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful, especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury, its proper operation being to remedy a mischief, or remedy an inconvenience, that might result in the general rule of law: so true it is that *in fictione juris semper subsistit æquitas* (citing 11 Rep. 51, Co. Litt. 150).

Maine, in ch. vi of the *Ancient Law*, refers to "the latter Rabbinical jurisprudence, which pretends to supply the *casus omissi* of the Mosaic Law." This is the only instance found in his writings which directly takes into consideration the later Jewish jurists. The belief in the existence of an oral law in the Jewish system, parallel with its statutory code, is supported by the obvious necessity of a method of hermeneutics to explain the elliptical passages of the code, ellipsis not only of text, but of meaning. The fact that the Jewish *prudentes* should have pos-

¹ *Ancient Law*, ch. ii.

² 3 *Bl. Comm.*, ch. iv. p. 43.

essed a "common law" upon which to found responses in their sphere of interpreting the law to meet the varying circumstances which confronted them, is an historical phenomenon which jurists can readily appreciate. If the object of the legal fiction in the civil law and the common law was twofold—the maintenance of law, together with the amendment of laws—the legal device of textual circumvention and textual expansion in the Jewish system served three purposes: it protected the idea of law, brought the application of the law in line with current exigencies, and maintained the fabric in its integrity, so that it might endure unimpaired, to remain for all times as the text of the law for Israel, handing down the traditional authority for its elucidation, its adaptation and its development.

In considering the scope of fictions, it should be observed that further fictions may develop in the exercise of fictional process—using the term fiction in its purely technical sense. There may be a fictional method of carrying out the fictional principle of "amendment without abrogation." There may be two fictions simultaneously at work—the first, the fundamental or general fiction of "amendment without abrogation"; the second, the particular or specific fiction superadded in the particular case. The view that this is not new law is the fundamental fiction; but the method by which the case has been brought before the Court may also be fictional, and this is the specific fiction. Fictions are thus applied to substantive law (rights) and adjective law (remedies); and adjectival fictions abound in all systems.

The parallel existence of an oral law in the Jewish system is a matter which presents no difficulty of belief for jurists. *Ex nihilo nihil fit* is a maxim which the history of jurisprudence tends to confirm.

Upon the fundamental theory, that of an immemorial law, has been raised the great structure of the Jewish oral law, the common law of the Jewish legal system with its attendant equity.

The legal device as manifested in the theoretical framework of Jewish law has so far been dealt with and there now remain for consideration specific legal devices as illustrated in the Jewish legal system. The most outstanding instance is the *Prosbul* of Hillel (who flourished between the 30th year before to the 10th year after the Christian era), which sought to avoid infraction of the scriptural enactment relating to forfeiture of debts once in every seven years in the years of "release" so-called (Deut. xv. 3).

More familiar in practice in these days is the method of selling of leaven (*Mecherat Chametz*) in respect of Passover.

To avoid an infraction of the law which forbids the retention of leaven during Passover Week, a document is drawn up transferring the property thereby to a non-Jew, the reversion of the property in the original owner taking place after Passover. Common lawyers can compare such a document with a "sale of goods" contract.¹

¹ See Sale of Goods Act, 1893, s. 18. *Tarling v. Baxter*, 6 B. & C. 360; *Reid v. Macbeth*, [1904] A.C. 223; see also s. 17 (1).

Again, a similar document transferring the business to a non-Jew for the Sabbath day enables the business on that day to be carried on without interruption. The term *Prosbul* is variously derived from the Greek *πρὸς βουλῇ βουλευτῶν* (before the assembly of counsellors) or *προσβολή* (delivery).

Here is the description of it by the late learned Liverpool Rabbi, Rabbi S. J. Rabinowitz, in a paraphrase from the original Hebrew by Grand Rabbin I. Raffalovich and the present writer¹:

Scripture enjoins the forfeiture of moneys lent at the advent of the year of release. No mention is made as to the motive underlying the injunction. . . . What, however, is to be done when the whole order of things is changed, when credit is an indispensable element of existence? To fulfil the statute in its literalness is impossible, in addition to which it is ethically wrong that because A accommodated B in lending him a sum of money he should be the loser, while B should enjoy money for which he has not worked. Moreover, an insistence on the literal fulfilment of this law would result in economic disaster, as credit would be utterly destroyed. . . . To abrogate the law we are not allowed, and there may arise an occasion when its fulfilment would not violate the ethical principle and when it would be incumbent to follow it. What was to be done? Then Hillel had recourse to legal device and instituted what is known as *Prosbul*. The text conveying the injunction of forfeiture of loans in the year of release obviously refers to the *individual*. One individual may not claim his debt from another individual in the year of release. He therefore instituted that before the advent of the year of release the creditor should transfer all his debts to the *Court*, which can legally and according to the letter of the law collect all such moneys outstanding. Thus the statute is not abrogated, and if the amount of the debt is a small one, or the creditor is in a position to disregard the loss, the statute can be literally observed. In this case the circumvention does not violate the ethical principle but even strengthens it.

The reader will observe here the indications of notions of "contracts of record" and of the distinction between individuals and corporate entities.

Another illustration is to be found in the legal device by which partnership in a special form is under the Jewish Law able to avoid the "full stop," commercially speaking, resultant from the literal application of the rigorous anti-usury laws of the Hebrew Scriptures.² The economic necessity of the capitalization of business demanded that industry and money should not be asunder. The relation of debtor and creditor, in respect of loan at interest, was unallowable under the Jewish statute law, and it went through the metamorphosis of co-partnership and the would-be creditor becomes a partner entitled to a share of the profits. This is the first step, the second being that the would-be creditor substitutes for the share of profits previously mentioned a definite sum. This is a sum in lieu of profits and is not regarded as interest. Of course the would-be creditor would be liable to bear his proportion of the loss,

¹ *Jewish Review*, vol. iv, p. 348 *et seq.*

² See Exod. xxii. 24; Lev. xxv. 36; Deut. xxiii. 20, 21.

an element which sharply distinguishes the transaction from those coming within the ambit of stat. 63 & 64 Vict. c. 51 and related statutes.¹ The document is termed *Shtar*² *Hetar Iska*. Rabbi Rabinowitz observed :

The institution of *Hetar Iska* is . . . the only way to get us out of the difficulty. And in truth it is hardly an evasion at all since the lender bears to some extent part of the responsibility, and as already mentioned, if the borrower . . . incurred loss in the transaction, the lender would have to bear it equally. Who can suggest that such a procedure is unjust or unethical ? Of the same character are all the devices instituted by the Rabbis. . . . The idea underlying them all is that the law be left intact, and yet it should be possible to accommodate ourselves to the exigencies of life. A device can only then be regarded as an unethical evasion . . . if thereby we act contrary to the inner and ethical significance of the statute.³

The general position is lucidly summed up by Rabbi Rabinowitz in the following passage :

The scriptural law is immutable and its laws are not changeable. Changes in time or place can have no effect on the durability of the law. Only those observances which were confined to the Land of Israel, such as sacrifices, tithes, etc., ceased to be observed when the Jews were banished from their land, for the simple reason that they could not be observed since they were dependent on that particular land and had no *raison d'être* outside it. All other laws could not by reason of change in circumstances be abrogated. If, however, the exigencies are such that the observance of a certain law becomes quite impossible, then it is the duty and in the power of the authoritative teachers of each generation to effect, in accordance with definite rules and regulations, a compromise between the strict letter of the law and the newly arisen circumstances ; to suspend, as it were, the law until the time when those circumstances shall cease to exist. One of these compromises is the lawful method of circumvention by the legal device.⁴

The equities which the learned Rabbi describes suggest the more expansive equities in the early days of English equity, such as those recently disclosed by the late Dr. Bolland's researches into the English *Year Books*, the equity dispensed in pre-Chancery days of the Courts of Common Law and akin to those equities enforced right up to the time when equity was elastic enough to be the medium whereby the Chancery Court was pleased to regard itself as a Court of Conscience rather than a Court where equity followed the law. If some, then, are inclined to consider rabbinical equity as too largely synonymous with ethics, it were well to remember the English *Year Books* and the earlier Chancery reports.⁵

¹ As to how far such a document is a " partnership " under the English law see the Partnership Act, 1890, s. 2 ; *Ross v. Parkyns*, 20 Eq. 331 ; *Sutton v. Grey*, [1894] 1 Q.B. 285 ; *Walker v. Hirsch*, 27 Ch.D. 460.

² The word *Shtar* in an Anglicized form is known to readers of English legal history as " Starrs." Cf. *Select Pleas, Starrs and other Records from the Rolls of the Exchequer of the Jews*, Selden Society, vol. xv.

³ *Op. cit.*

⁴ *Op. cit.*

⁵ See Professor Hazeltine's " The Early History of English Equity " and Sir Frederick Pollock's " The Transformation of Equity " in *Essays in Legal History* (Oxford, 1913).

The consideration of these juristic phenomena in Jewish law is not merely important as part of the work of the survey of the Jewish system in the light of legal theory, but because there are some signs that a new element in the review of universal legal history is beginning to appear. Dr. Nathan Isaacs of Harvard has contributed a brilliant essay on "The Influence of Judaism in Western Law" to the volume *The Legacy of Israel* recently published.¹ It brings together many points raised in other contributions by the learned writer. We know of Romanists and Germanists and the light they have thrown on the darker recesses of the legal history of Occidental civilization. But Dr. Isaacs has helped those who believe not merely *ex oriente lux*, but *ex oriente lex*. He has shown that from Zion there will go forth the Law as it has done in the past, and that Romanists and Germanists must count as new, yet old, colleagues Hebraists to make clear the pedigree of the relationships which constitute the common bond of humanity.

¹ Oxford.

ALTERI STIPULARI NEMO POTEST IN THE LAW OF SOUTH AFRICA.

[Contributed by GEORGE W. KEETON, ESQ., M.A., LL.M., Senior Lecturer in Law in the Victoria University of Manchester.]

IN the second edition of his *Introduction to Roman-Dutch Law* Dr. Lee considers the nature of stipulations for the benefit of a third person, in the course of an appendix¹ which the student may perhaps regret was not a little longer. After indicating the principal recent cases which have arisen in South Africa upon the question, he leaves the student free to pursue his own investigations. In the present article a consideration of those cases is attempted.

Although the rule itself, *alteri stipulari nemo potest*, is clearly stated in Justinian's *Institutes*,² the explanation furnished is scarcely convincing. He adds: *Inventæ sunt enim hujusmodi obligationes ad hoc ut unusquisque sibi acquirat quod sua interest; ceterum, ut alii detur, nihil interest stipulatoris*. These observations tend to obscure the fact that *stipulatio*, a contract, is based on agreement, and it is obvious that an agreement between A and B normally ought not to be allowed sufficient legal force to vary the rights of C, unless C is associated in some way with the contract. It is of this that Paulus is thinking when he writes: *Quæcumque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostra persona obligationis initium sumant, inanem actum nostrum efficiunt: et ideo neque stipulari neque emere vendere contrahere, ut alter suo nomine recte agat, possumus*.³ To this rule there were a few exceptions. The occasions on which a right was definitely given to a third party have been investigated by Eisele, and Professor Buckland briefly notices them.⁴

In modern systems of law the rule has received varied treatment. English law accepts it without qualification so far as the law of contract is concerned. The question was settled in *Tweddle v. Atkinson*,⁵ and was unhesitatingly reaffirmed in *Dunlop v. Selfridge*.⁶ It is, of course, obvious that other branches of English law (e.g. the law of trusts and the law of property) permit the acquisition of a right under an instrument to which the person claiming was not a party. In France, where the *stipulatio alteri* receives legal recognition, the right of the third party

¹ Appendix H.

² III. xix. 19; cf. III. xix. 4, and D. XLV. 1.38.17.

³ D. XLIV. 7.11.

⁴ *Text-book of Roman Law*, p. 423.

⁵ [1861] I.B. & S. 293.

⁶ [1915] A.C. 847.

is conceived as being founded on the contract, but not a right *ex contractu*.¹

In Roman-Dutch law the rule is affirmed by Grotius, who adds, however, that the third party may adhere to the contract, and so acquire a right against the promisor unless the latter revokes this promise before the third party has adhered. The rule of Justinian, however, is denied by Voet, Groenewegen, Heineccius and Decker, but Professor Lee is doubtful whether the view they adopt goes beyond that of Grotius,² the true interpretation of which would appear to be that if A purports to act for a named principal, without in fact possessing authority, the principal may ratify the contract, and so automatically acquire a right of action under the contract. What is now being considered, however, is the case where A claims to act as principal, and not as agent. Under any circumstances it is not questioned in Roman-Dutch law that a principal can acquire rights under his agent's contracts; a wife may under her husband's, a ward under his guardian's, a child under his parent's, and a parent under the child's, if the contract is in each case made on behalf of the third party.³

Over and above these occasions, however, it has been recognized in South Africa, in a series of judicial decisions, that if A and B enter into a contract as principals that A will pay money to C, the latter obtains a right enforceable by action under the contract, there being neither before nor after the making of the contract any assumption that B is acting as the agent of C. Van der Keessel was of the opinion that a notary or other public person could accept a promise for a third person, and the latter could acquire a right under it.⁴ On the other hand, Vinnius demonstrated that it is doubtful whether the third party in such a case could acquire a right without ratification,⁵ and in this case nothing more is claimed than is admitted by Grotius and the commentators who follow him. In any case, in South African law, the position of the notary in stipulating does not at present differ from that of any other person.⁶

In *Tradesmen's Benefit Society v. Du Preez*, however, a husband joined a benefit society, which promised to pay £20 for burial on the death of each member. He was allowed to nominate the person to whom this was to be paid, but if he failed, any person, within a list of specified persons, could claim. These were the wife, the children, father, mother, brother or sister of the deceased. The husband died, and the widow claimed. The magistrate allowed the claim. On appeal, it was urged that there was no privity of contract between the widow and the society. The appeal failed, Sir Henry de Villiers C.J. holding that "where there is in existence a binding engagement for valuable consideration between

¹ Lee, *Elements of Roman-Dutch Law*, p. 402.

² *Op. cit.*, pp. 229-230; and Decker, trans. Van Leeuwen, ii, p. 600.

³ Lee and Decker, *loc. cit.*

⁴ Thesis 510 (cited in editor's note to Van Leeuwen, ii, p. 602).

⁵ *Ibid.*

⁶ *Tradesmen's Benefit Society v. Du Preez* (1887) 5 S.C. at p. 277 (cited Lee, p. 230).

the promisor and the promisee, there can be no possible injustice in allowing the third person, for whose benefit the promise was made and was intended to be made, to recover upon the same," and further, "that there is no authority in our law for adopting the rule of the English law, that the consideration for a promise must move from the plaintiff who seeks to enforce the promise. If once a just cause had been established, a third person may, in my opinion, adopt and ratify a stipulation made on his behalf by another. From the moment of such ratification being announced to the promisor, he is bound to complete his promise for the benefit of such third person, exactly as if the relation of principal and agent had subsisted between the original promisee and such third person."¹ The difficulty of the case, however, arises from the fact that the enunciation of the rule was not required for its decision, since the widow was not an extraneous person, and, as Ritterhuisius says, *jure civili certum est alteri extraneo stipulari neminem posse*.²

The decision in this case, however, was followed in *Hyams v. Wolf and Simpson*,³ and received further consideration in *Mutual Life Insurance Co. of New York v. Hotz*.⁴ In this case, Lazarus Pelunsky, residing in the Orange River Colony, insured in 1905 his life with the defendant Company, which agreed to pay the amount of the insurance to Jacob Pelunsky, the father of Lazarus, who lived in Russia. Jacob Pelunsky died in 1909, without having accepted the benefit of the policy and in ignorance of its existence, whereupon Lazarus attempted himself to obtain the surrender value of the policy. The company argued that the legal representatives of Jacob were entitled to the benefit of the policy, and that it was necessary for them to cede their rights to Lazarus before he was entitled to the surrender value. Subsequently Lazarus purported to cede his rights to Hotz. The trial judge held that Jacob could have no right against the company until he had ratified and notified them. If the stipulation is made for the benefit of a third party only (*i.e.* Jacob), who does not ratify, neither can sue. In insurance, however, the right to surrender is given to the promisee (Lazarus) and Jacob could not surrender against the will of the insured. It was accordingly held that the surrender value ought to be paid to Lazarus (or his assign). This view was overruled on appeal, Lord de Villiers C.J. holding that as the company had promised to pay the amount to the father, the son could not recover, but that "it was still competent for the representatives of the father, after his death, to ratify the stipulation made in his favour by his son."⁵

In *Van der Plank, N.O. v. Otto*⁶ the plaintiff's mother in 1882 received a lease of a farm from her father in virtue of a document which declared that the lease was granted "for the term of her natural life. . . . In the event of the death of my said daughter, then her eldest son shall have the

¹ At p. 279 (cited Nathan, *Common Law of South Africa*, iii, p. 531).

² Van Leeuwen, p. 603.

³ T.S. 1908, p. 78.

⁴ [1911] A.D. 556.

⁵ At p. 563.

⁶ [1912] A.D. 327.

farm for the term of twenty-five years from the date of her demise." The plaintiff's mother remained in occupation until 1910. In 1901, she had surrendered the farm, and joined with several other beneficiaries of her father's will in appointing a trustee to administer their interests. In 1882 the plaintiff was three years old and his father, who kept the document, did nothing to indicate acceptance of the promise for his son, although he expressed approbation of the document. In 1911 the trustee proposed to sell the farm, and an action was brought against him for a declaration that a lease of the farm for twenty-five years accrued to the son on the death of his mother. In disallowing the claim, Solomon J., in the Appellate Division, observed: "The grandfather died in October 1882, only two months after the document sued upon was signed, and there is no proof that either to him or to his executors after his death was any notification made that the stipulation in favour of the plaintiff had been accepted." ¹

Referring to the contention that the stipulation was still open for acceptance, on the analogy of *Mutual Life Insurance Co. of New York v. Hotz*, the judge held that it was not, since the plaintiff's mother, in 1901, had assigned not only her own rights under the document, but her son's, he not having accepted at that date.

In *Wallach's Trustee v. Wallach*,² the nature of third party rights under a contract was considered under circumstances rather different from those in the preceding cases. In 1907 Joseph Wallach insured his life with the expressed object of benefiting his wife and children. In July 1912, being insolvent, he ceded the balance of the amount due on the policy to his brother for the benefit of his wife and children. He died eleven days later, and the trustee of his insolvent estate claimed the proceeds of the policy so ceded. S. 28 of the Transvaal Insolvency Law enacts that a policy of life insurance *bona fide* effected by the insolvent two years at least before the granting of the order of sequestration for the benefit of the wife or children "shall fall outside the sequestrated estate." The Court held the trustee entitled to the proceeds of the policy. Lord de Villiers C.J. observed that when the Act spoke of intention to benefit the wife and children, it meant more than mere intention, and implied some act done, by which the intention was carried into effect, and Innes J.A. drew a distinction between policies drawn in the insolvent's favour (as in the present case) but with the object of benefiting the wife or children, and policies expressed to be for the benefit of the wife or children, and drawn in their favour (as in *New York Mutual Life Insurance Co. v. Hotz*). The latter only were protected by the Act of 1895.

In *Brown's Executrix v. McAdams* ³ Brown agreed with McAdams to put £20,000 into the Masterpiece Gold Mining Company. Three years later, Brown not having put in the money agreed on, McAdams brought an action for breach of contract, and the company, as benefiting third

¹ At p. 335.

² [1914] A.D. 202.

³ [1914] A.D. 231.

party, brought a further action for specific performance. The company failed, as they had not accepted the advantage conferred by the contract.

The last case in the series, *McCulloch v. Fernwood Estate, Ltd.*,¹ is in many respects the most interesting of them all. Apsey, on behalf of the unformed Fernwood Estate Company, bought land from McCulloch, who brought an action to recover £10,000, the agreed price. In English law, of course, it has been held in *Kelner v. Baxter*² that a person purporting to act as agent for an unformed company cannot validly contract on behalf of that company. This rule was applied to South Africa, on similar facts, in *Natal Land and Colonization Co. v. Pauline Colliery Co.*³ by the Privy Council, the Roman-Dutch authorities not being considered during the appeal. This case, however, was distinguished from *McCulloch v. Fernwood Estate, Ltd.*, on the ground that while the person contracting on behalf of the company in the former case claimed to act as agent, Apsey, in the later case, acted as principal, the company, under the general rule of third party rights in South African law, ratifying when it came into existence. From this it follows that if it ratifies the contract so made, it can be sued on it.

In *Kynoch's, Ltd. v. Transvaal Silver and Base Metals, Ltd.*,⁴ the principle established in *McCulloch v. Fernwood Estate, Ltd.*, was applied. A manufacturer of explosives contracted with a company, which claimed to contract for itself and also on behalf of any companies which came under its control during the period of the agreement, to sell to the company all the explosives required for a certain period, at certain prices. A company controlled in this way by the contracting company was held entitled to adopt and to enforce the contract.⁵

From these cases it is submitted that the following conclusions may be drawn :

1. That in Roman-Dutch law, as applied in the Courts of South Africa, it is possible for persons to contract, as *principals*, for the benefit of a third party.

2. That before the third party can sue (*Mutual Life Insurance Co. of New York v. Hotz*), or be sued (*McCulloch v. Fernwood Estate Co.*), he must ratify the contract so made for his benefit, and notify that ratification to the party bound.

3. That the third party need not ratify immediately (*Mutual Life Insurance Co. of New York v. Hotz*), but where the third party does not ratify, and the original promisee validly abrogates the rights of the third party under the contract, it is no longer open to the third party to ratify and claim the benefit (*Van der Plank, N.O. v. Otto*).

4. Where a person stipulates for the benefit of a third party, who is a corporation not yet in existence, if he contracts as principal the corporation, when formed, may ratify and claim the benefit (*McCulloch v. Fern-*

¹ [1920] A.D. 204.

² [1866] L.R. 2, C.P. 174.

³ [1904] A.C. 120.

⁴ [1922] W.L.D. 71.

⁵ I am indebted to Dr. D. T. Oliver for indicating this case.

wood Estate Co.), but if he purports to act as agent, the corporation may not ratify (*Natal Land and Colonization Co. v. Pauline Colliery Co.*).

5. Action brought by the original promisee does not prevent the third party enforcing his benefit under the contract (*McCullogh v. Fernwood Estate Co.*).

6. On the juristic nature of the third party's relation to the contract, and the rights so created, South African Courts have made no clear pronouncement. The relation created, however, is not a trust, and since ratification by the third party is always a condition precedent to suing on the contract, it would appear that the effect of the ratification is to create a three-cornered contract, in which one party is usually bound to the other two, both of whom may enforce the obligation, but only one of whom takes the benefit. It is obvious, however, that the latter may also be bound to do something (*e.g.* pay the price in a sale) after he has ratified; from which it would appear that his rights and liabilities are exclusively contractual.

CONSTITUTIONAL QUESTIONS IN NOVA SCOTIA.

THE ATTORNEY-GENERAL OF NOVA SCOTIA *v.* THE LEGISLATIVE COUNCIL OF NOVA SCOTIA.

[Contributed by PROFESSOR NORMAN MACKENZIE, *University of Toronto.*]

THE Judicial Committee of the Privy Council recently decided¹ that the Lieutenant-Governor of the Province of Nova Scotia acting on the advice of his ministers might take certain steps which would result in the abolition of the Legislative Council, thus finally settling a dispute that has been going on intermittently for over fifty years.

History of the Legislative Council.—The Legislative Council of Nova Scotia, the last Second Chamber in Canada, with the exception of that in Quebec, and the Senate of Canada, came into being as a result of certain provisions in the Commission of Lord Durham dated February 6, 1838. Prior to this there had been a single Council in Nova Scotia which possessed both legislative and executive functions. The "old" Council was thoroughly unpopular in many quarters because of the conditions existing under the "Family Compact" system. A similar system, and the abuses which grew up around it, were among the causes of the rebellions in both Upper and Lower Canada, and this system if continued would almost certainly have meant the loss of Canada to the British Empire.

Happily better judgment prevailed both in London and in the "Canadian Provinces." Lord Durham was sent out to inquire into the situation, and in his Report recommended certain changes which, after their introduction, removed most of the causes of the disaffection.

Lord Durham's Commission.—The immediate result for Nova Scotia was the division of the old Council into two, an executive and a legislative council, the latter possessing the powers of the old Council in regard to the enactment of laws.

In Lord Durham's Commission it was provided :

that the said Executive Council and said Legislative Council respectively shall hereafter consist of such and so many members as shall from time to time for that purpose be nominated and appointed by us, under our sign-manual and signet or as shall be provisionally appointed by you, the said John George, Earl of Durham, until our pleasure therein shall be known. Provided nevertheless and we do hereby declare our will and pleasure to be that the total number of the members for the time being of our said Execu-

¹ *The Times*, October 19, 1927; 44 T.L.R. 1.

tive Council resident within our said Province shall not at any time *by any provisional appointment* be raised to a greater number in the whole than nine and that the total number of members of the said Legislative Council resident within our said Province shall not at any time *by any such provisional appointments* be raised to a greater number in the whole than fifteen.

And further on :

We do hereby give and grant unto you, the said John George, Earl of Durham, full power and authority to suspend any of the members of our said Executive and Legislative Councils respectively, from sitting, voting or assisting in such respective Councils, if you shall find just cause for so doing, and if it shall at any time happen that by the death, departure out of our said Province, suspension or resignation of any of the said councillors or otherwise, there shall be a vacancy in either of our said Councils, our will and pleasure is that you signify the same to us by the first opportunity that we may, under our sign-manual and signet, constitute and appoint others in their stead. But that our affairs at that distance may not suffer for want of a due number of Councillors, we do hereby give and grant unto you, the said John George, Earl of Durham, full power and authority to choose as many persons out of the provincial Freeholders, Inhabitants of our said Province of Nova Scotia as shall be necessary to supply any vacancy or vacancies which may from time to time occur in the said Councils or either of them, which persons so chosen and appointed by you shall be to all intents and purposes Councillors in our said Province, until their appointment shall either be confirmed or disallowed by us.

Earl Cathcart's Commission.—From 1838 to February 1843 there were four Captains-General and Governors of Nova Scotia appointed with instructions and commissions similar to those of Lord Durham, but in 1843, February 24, the Earl Cathcart received a commission in which there were the following changes :

And we do hereby appoint and declare that the said Executive Council and the said Legislative Council respectively shall consist of *such and so many members, as have been, or shall hereafter be from time to time for that purpose nominated and appointed by us under our sign-manual and signet*, or as shall be provisionally appointed by you the said Earl Cathcart until our pleasure therein shall be known. Provided nevertheless, and we do hereby declare our pleasure to be that the total number of the members for the time being of our said Executive Council resident within our said Province shall not at any time by any such provisional appointments be raised to a greater number in the whole than nine, and that the total number of the members of the said Legislative Council, resident within our said Province, shall not at any time by any such provisional appointments be raised to a greater number in the whole than *twenty-one*.

In it, too, were provisions similar to those in Lord Durham's commission with reference to the filling of vacancies caused by death, departure from the Province, suspension or resignation.

Sir Edmund Walker Head's Commission.—On September 20, 1854, Sir Edmund Walker Head was appointed Captain-General and Governor-in-Chief of Nova Scotia and some slight changes were made as to appoint-

ments to both Executive and Legislative Councils—to the following effect :

The Executive Council shall—

Consist of such persons as you the said Sir Edmund Walker Head shall from time to time in our name and on our behalf nominate and appoint by instruments to be passed under the public seal of our said Province . . . and we do hereby declare our pleasure to be that the total number of the members of our said Executive Council . . . shall not at any time by any such appointment by you be raised to a greater number in the whole than nine.

And then there was this declaration as to the Legislative Council :

And we do hereby declare our pleasure to be, that the said Legislative Council shall consist of *such and so many members as have been, or shall hereafter be, from time to time, for that purpose nominated and appointed by us under our sign-manual and signet*, or as shall be provisionally appointed by you, until our pleasure therein shall be known ; Provided, nevertheless, and we do hereby declare our pleasure to be, that the total number of the members of the said Legislative Council, for the time being, resident within our said Province, shall not at any time, by such provisional appointments, be raised to a greater number in the whole than *twenty-one*.

In the letter of instructions to Sir Edmund Walker Head accompanying his Commission all of the then Legislative Councillors were reconstituted and reappointed “ during our pleasure.”

Viscount Monk's Commission.—Viscount Monk was the Captain-General and Governor-in-Chief when the British North America Act was passed. His Commission was dated November 2, 1861, and contained the same provisions—word for word—with regard to the Executive Council and the Legislative Council as those quoted above from the Commission of Sir Edmund Walker Head and the letter of instructions to Viscount Monk also reappointed all of the then existing members of the Legislative Council “ during our pleasure.”

British North America Act.—This was the situation in 1867 at the time of the passing of the British North America Act. By the terms of this Act—

The Governor-General of (Canada) in Council appoints a Lieutenant-Governor for each Province. S. 58—B.N.A. Act.

The constitution of the executive authority in Nova Scotia shall, subject to the provisions of the B.N.A. Act, continue as they existed at the union until altered under the authority of that Act.—S. 64.

The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this (B.N.A.) Act, continue as it exists as the union, until altered under the authority of this Act.—S. 88.

The Provincial Legislature is given the power to amend the constitution of the Province from time to time except as regards the office of Lieutenant-Governor.—S. 92.

And by virtue of this last there was passed an Act, Chapter 13 of the Acts of 1872, providing that—

After the passing of this Act the appointment of members of the Legislative Council in the Province of Nova Scotia shall be vested in the Lieutenant-Governor, who shall make such appointments in the Queen's name by instrument under the Great Seal of the Province.

This in a general way summarizes the history of the Legislative Council from a constitutional and documentary point of view, and after due consideration of the documents cited, the Judicial Committee of the Privy Council decided that the Lieutenant-Governor has power to make certain changes in the composition of the Council.

Political History of the Council.—The political history is much more interesting and certainly more complicated. At Confederation the Conservative Government then in power in Nova Scotia had filled all the vacancies in the Council (of which there were a number), occasioned not only by natural causes but by the appointment of a number of Councillors to the newly formed Senate of Canada ; so that the Liberals who were returned in September of 1867 were in a minority in the Council.

By 1879, however, when the Conservatives under the leadership of Holmes and Thompson were returned, the political complexion of the Council had changed and it refused its assent to different Bills submitted by the Lower House—notably one on higher education, that had been passed with only one dissenting voice and a Bridge Bill which had passed without opposition in the Lower House.

The Holmes-Thompson Government then attempted to get rid of the Council—basing their reasons on grounds of economy—first by a Bill which the Council refused to agree to ; later by an address to the Queen, petitioning her to abolish it by Imperial Legislation. To this the Secretary of State for the Colonies replied that in his opinion the circumstances did not at the moment call for such action.

The Government then communicated with the Governments of the other Maritime Provinces, New Brunswick and Prince Edward Island, suggesting that they should take united action for the abolition of all three Upper Houses. The Governments of the other two Provinces took the matter up and eventually got rid of their Councils, but Nova Scotia was less successful.

In 1882 the Holmes-Thompson Government was defeated and the Liberals who replaced them continued their attempts to get rid of the Council.

Like their predecessors, they extracted pledges from all the new appointees by which they (the Councillors) agreed to support in the Council any measures adopted by the Government for its abolition.

Some doubt, however, was cast on the constitutionality of these pledges, and the Council, for greater certainty, asked the opinion of three able jurists (Sir R. L. Borden, Hon. Benjamin Russell and Dr.

R. C. Weldon). All three advised that in their opinion these pledges were unconstitutional.

Meanwhile, numerous Bills and resolutions had been passed in the House of Assembly for the abolition of the Council—notably in 1888, 1890 and 1894—and in that year (1894), the Council presented a memorial to the Queen—giving an outline of its history and of the valuable services it had rendered to the Province.

Mr. Armstrong, the last Liberal premier (1924), had the constitution of the Legislative Council so changed that the new members were appointed for ten-year periods instead of for life, and provided that all legislation, save that relating to the Council itself, should on passing the House of Assembly at three successive sessions become law without the concurrence of the Upper House.

After over forty years of continuous Liberal Government the Conservatives were returned in 1925—with a large majority—and found themselves faced with a situation very similar to that of their predecessors after confederation—an almost complete opposition in the Upper House, and the new Premier, Mr. E. N. Rhodes, set himself finally to abolish the Council.

Attempted Abolition of the Council.—To this end, on the refusal of the Council to vote themselves out of existence, Mr. Rhodes requested Mr. F. F. Mathers K.C., the Deputy Attorney-General, to advise the Government whether or not it was constitutional to have new members appointed in excess of the twenty-one prescribed. Mr. Mathers answered that it was, but in the meantime the Lieutenant-Governor had asked the opinion of the Law Officers of the Dominion Government, who replied that, in their opinion, the matter was in doubt and recommended that a stated case be argued before the Supreme Court of Nova Scotia. Meanwhile a Bill which had been passed by the House of Assembly, looking to the abolition of the Council, was rejected by the Council itself.

Reference to the Court.—The Lieutenant-Governor in Council then referred to the Court for decision certain questions with reference to the Legislative Council and these several matters were argued by counsel representing the Government and the Legislative Council. The questions in the order in which they were stated in the Order in Council are :

(1) Has the Lieutenant-Governor of Nova Scotia, acting by and with the advice of the Executive Council of Nova Scotia, power or authority to appoint in the name of the Crown by instrument under the Great Seal of the Province so many members of the Legislative Council of Nova Scotia that the total number of the members of such Council holding their offices or places as such members would

(a) exceed twenty-one
or

(b) exceed the total number of the members of said Council who held their offices or places as such members at the Union mentioned in s. 88 of the British North America Act, 1867 ?

(2) Is the membership of the Legislative Council of Nova Scotia limited in number ?

(3) Is the tenure of office of members of the said Council appointed thereto prior to the 7th day of May, A.D. 1925, during pleasure or during good behaviour or for life ?

(4) If such tenure is during pleasure is it during the pleasure of His Majesty the King, or during the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia ?

Opinion of the Court.—The Court which heard the case (Harris C.J. and Chisholm, Mellish and Carroll JJ.) were unable to arrive at any agreement on the matter.

The Chief Justice answered parts (a) and (b) of Question No. 1 in the affirmative. His answer to Question No. 2 was "that at present a full House is twenty-one members, but the number can be increased at any time by the Lieutenant-Governor." His answer to Question No. 3 was "During pleasure"—and his answer to No. 4—"During the pleasure of His Majesty as represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council for Nova Scotia."

Chisholm J. was of the same opinion save that to Question No. 2 he replied that the membership of the Legislative Council is limited only by the discretion of the Lieutenant-Governor acting on the advice of his Executive Council in the same way and to the same extent as it was limited before the passing of Chapter 13 of the Acts of 1872 (N.S.).

Mellish J. answered Question No. 1 (a) in the negative. Question No. 1 (b) in the affirmative subject to the limitations involved in the first answer. Question No. 2 in the affirmative. Questions Nos. 3 and 4 to the effect that the tenure of office of the Legislative Councillors was at the pleasure of the Crown, it being the Crown's expressed pleasure, however, that no more than seven members of any one Council would be called upon without cause to hold office for a shorter term than one for life, and that in this respect the constitution of the Council has not been altered by legislation affecting the Councillors to whom the third and fourth questions apply, and he answered these questions accordingly.

Carroll J. answered the questions as follows : No. 1 (a) in the negative. (b) The number may exceed the number who held office in 1867 at the Union but shall not exceed twenty-one. No. 2 in the affirmative, but the Legislature has the power to make any changes it desires. No. 3. During pleasure. No. 4. During the pleasure of His Majesty the King and not during the pleasure of His Majesty as represented by the Lieutenant-Governor of Nova Scotia.

Appeal to Privy Council.—In consequence of this difference of opinion no final judgment or opinion could be given, but for the purposes of appealing to His Majesty in Council, the Court certified *pro forma* for

all the purposes of the appeal that its opinion was according to the opinion of the Chief Justice.

Judgment of Judicial Committee.—The Hon. W. L. Hall, K.C., Attorney-General for the Province of Nova Scotia, and Mr. S. E. Pocock argued the case for the Appellant and Stuart Jenks, K.C. for the Respondent. The judgment of the Judicial Committee based on the documents cited above was as follows :

These being the relevant statutes and documents, their Lordships proceed to consider the questions referred to the Supreme Court in their order.

The first and second questions may conveniently be dealt with together.

It is plain from the above statement that the Commissions issued to successive Governors from the year 1838 until the Union of Canada did not by their terms impose any limit upon the number of members of the Legislative Council of the Province who might be appointed by the Sovereign. There was indeed a limit—originally of 15 and afterwards of 21—upon the number of such members who might be provisionally appointed by the Governor subject to confirmation by the Queen ; but this provision in no way purported to restrict the power of the Queen herself to appoint “ such and so many members ” of the Council as she should from time to time think fit. . . .

Then was there anything outside the Commissions to limit the number to 21 ? For this purpose stress was laid on behalf of the respondents on a correspondence which passed between the Lieutenant-Governor for the time being of the Province (Viscount Falkland) and Lord Stanley, as Colonial Secretary, in the year 1845. . . . In the Commission issued to Lord Cathcart shortly after the date of this correspondence . . . no limit was placed upon the number of members who might be permanently appointed by the Sovereign ; and the inference must be that it was the intention of Queen Victoria, while in practice confining her appointments to 21, not to impose any limit on her own power to make appointments exceeding that number. Similar observations apply to a letter of May 4, 1846, written by Mr. W. E. Gladstone as Secretary of State for the Colonies. . . . Their Lordships find nothing in this correspondence to limit the number of the Legislative Council.

But it was argued that s. 88 of the British North America Act, 1867, which provided that the constitution of the Legislature of Nova Scotia should, subject to the provisions of that Act, “ continue as it exists at the union until altered under the authority of this Act,” had the effect of limiting the number of Legislative Councillors either to 18—the number of Councillors who were actually in office at the date of the union—or to 21, the number then ordinarily appointed. Their Lordships are unable to accept this contention. . . . It is the constitution of the Legislature and not the number of persons actually or usually holding office under that constitution, which was to continue until altered under the authority of the Act ; and the constitution then existing provided for the appointment of a Legislative Council not limited except by the decisions from time to time taken by the Sovereign under the advice of her Ministers.

It was further argued that, even assuming that before and at the date of the Union the Sovereign had power on the advice of her Ministers in the United Kingdom to increase the membership of the Legislative Council of

Nova Scotia, that power has not passed to the Lieutenant-Governor of the Province but remains vested in the Sovereign in this country. Their Lordships cannot agree with that view. Whether on the passing of the British North America Act, 1867, the power to appoint the members of the Legislative Council was delegated by virtue of that Act to the Lieutenant-Governor of Nova Scotia, as the representative of the Crown for all purposes of provincial government, it is unnecessary to inquire; for at all events that power has been vested in him since the passing of the Nova Scotia Act of 1872 and is now exercisable by him on the advice of his Executive Council. It has not been suggested that either the Act of 1872, which vested the appointment of members of the Legislative Council in the Lieutenant-Governor, or the statute of 1923, which declares the appointment of such members to be vested in the Lieutenant-Governor in Council, was not within the powers conferred upon the Provincial Legislature by s. 92 (1) of the Act of 1867; and in their Lordships' opinion the right to increase the membership of the Council is not severable from the right to appoint new members. . . .

Their Lordships would therefore answer both parts of question 1 in the affirmative and question 2 in the negative.

The answer to the third question referred to the Supreme Court is dictated by similar considerations based on the history of the Province. It was expressly provided by Lord Durham's Commission of 1838 and by the Commissions issued to successive Governors after that time and before the union that the members of the Legislative Council should hold their places therein during the Queen's pleasure. . . . It follows that, according to the constitution of the Legislature as it existed at the time of the union, the members of the Legislative Council were appointed during pleasure, and in this respect, as in others, the constitution was continued by s. 88 of the Act of 1867.

With regard to the fourth question, their Lordships agree with the opinion of the Chief Justice and Mr. Justice Chisholm that the tenure is during the pleasure of the Sovereign represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of the Province. The effect of the Nova Scotia Act of 1872 as re-enacted in the Revised Statutes of 1923 is to vest in the Lieutenant-Governor in Council the appointment of members of the Legislative Council during pleasure; and in their Lordships' opinion this means that they are to be appointed during the pleasure of the appointing authority. It would be strange if the effect of the legislation of 1872 and 1923 were to enable the Lieutenant-Governor to make appointments which might be revoked by the Sovereign acting under the advice of his Ministers in this country; and in their Lordships' opinion this was not the intention or effect of the statutes in question. This view is supported by section 23, subsections 37 and 39 of cap. 1 of the Revised Statutes. . . .

The result is that their Lordships find themselves substantially in agreement with the opinions of the Chief Justice and Mr. Justice Chisholm on every point; and they will humbly advise his Majesty that the questions referred to the Supreme Court should be answered as follows: (1) (a) and (b) Yes. (2) At present a full house is 21, but the number can be increased by the Lieutenant-Governor in Council. (3) During pleasure. (4) During

the pleasure of his Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia.

Practical Reasons for Abolition of Council.—As to the practical reasons behind this determined attempt to get rid of the Council—three main arguments are usually advanced. First: That it is obsolete and unnecessary and that all the other Provinces in Canada, except Quebec, carry on their affairs without an Upper House. Second: That it tends to become an obstructionist body when made up of an opposition majority, and that this obstruction is political and is not in the best interests of the Province. Third: That it is an unnecessary expenditure of money—the total yearly budget for the Council being at least \$20,000 to \$25,000.

On the other hand, there are all the arguments usually advanced in favour of a Second Chamber, *i.e.* that it is a necessary guarantee of good, safe government.

However this may be, this historical Upper Chamber, 170 years old, has now ceased to exist. The Abolition Bill was agreed to by the Council on February 24, 1928, and assented to by the Lieutenant-Governor on March 2. In view of the fact that it is in accordance with the principles of responsible government that the elected chamber should ultimately control the form of government and the destinies of a country, that is as it should be.

THE PATHOLOGY OF DEMOCRACY WITH PARTICULAR REFERENCE TO PERSONAL LIBERTY UNDER FLEXIBLE AND RIGID CONSTITUTIONS.¹

[Contributed by EOIN O'MAHONY, ESQ., of the Inner Temple and
King's Inns.]

BIBLIOGRAPHY.—The following works have been used extensively in the preparation of this Paper, but the writer accepts responsibility for his opinions:—Lord Acton: *The History of Freedom* (Macmillan); Walter Bagehot: *The English Constitution and Parliamentary Reform*; Hilaire Belloc: *The Servile State* (Foulis); Jeremy Bentham: *Principles of Morals and Legislation*; Earl of Birkenhead: *Fourteen English Judges*; Charles Borgeaud: *Adoption and Amendment of Constitutions*; Viscount Bryce: *Studies in History and Jurisprudence and The American Commonwealth*; Chalmers and Asquith: *Constitutional Law*; De la Batut and Friedmann: *A History of the French People*; Dicey: *Law of the Constitution and Law and Opinion in England*; E. F. B. Fell: *Personal Liberty*; [Darrell Figgis]: *Select Constitutions of the World* (Dublin Stationery Office, 1922); Alexander Hamilton: *The Federalist* (with Jay and Madison); J. L. and Barbara Hammond: *Lord Shaftesbury* (Constable); Bernard Holland: *Imperium et Libertas*; Harold Laski: *A Grammar of Politics*; W. E. H. Lecky: *Democracy and Freedom and History of Ireland*; Sir Sidney Low: *The Governance of England*; President Lowell: *The Government of England*; Sir John Marriott: *The Mechanism of the Modern State* (1927); Medley: *English Constitutional History*; John Stuart Mill: *On Liberty*; Swift MacNeill: *Constitutional History of Ireland till the Union and Studies in the Constitution of the Irish Free State*; Raymond Poincaré: *How France is Governed*; Principal Sir Charles Grant Robertson: *Select Constitutional Documents*; John A. Ryan: *Declining Liberty* (Macmillan, 1927); Chief Justice Shea: *Life and Times of Alexander Hamilton*; Henry Sidgwick: *Elements of Politics*; Upton Sinclair: *The Goose-Step*; Tyler: *Memoir of R. B. Taney* (Murphy, Baltimore, 1872); Walpole: *The Kingdom of Ireland*.

Flexible Constitutions.—Mr. Harold Laski reminds us that personal liberty is no certain and unchanging notion, but that what is of its permanent essence is that the personality of each individual should be so unhampered in its development, whether by authority or custom, that it can make for itself a satisfactory harmony of its impulses. The harmonization, he adds, should be self-effected, and the rules laid down by the State should not bar the way to one individual as distinct from another. For Mr. Medley personal liberty implies freedom from petty official tyranny. For the Physiocrats, Mill, and

¹ Being the Auditorial Address of the University Philosophical Society, Cork, Session 1927–28, which was awarded the (1927) Governor General's Gold Medal for Legal Essay (Instituted 1927 in the Law Students' Debating Society of Ireland by T. M. Healy, Esq., K.C.).

the Utilitarians, it is in effect the embodiment of the Common Law maxim: "*Sic utere tuo ut alienum non laedas.*" To them it means the striking off of every unnecessary hindrance which law or custom imposes upon the free action of an individual citizen; the securing to every citizen of as much liberty as is consistent with giving the same amount of it to every other citizen. Whichever of the many interpretations of personal liberty satisfies us, we are forced, in the light of current experience, to the conclusion that, under a flexible constitution, the maintenance of liberty depends on the existence of one of two conditions. Either political power must rest, entirely, with an unelected oligarchy which is both upright and educated, or, the citizens must be able, while retaining supreme power, to choose an oligarchy which is anxious to preserve the theoretic end of the State. With the growth of democracy, the former condition becomes daily less practicable. The latter condition is at present realizable in Great Britain, but such a power is in truth beyond positive institutions, and when the saving aristocratic spirit of the English Constitution goes, one feels that the best thing for Britain, in order to balance the different constitutional elements, will be a rigid constitutional instrument. Judge Cooley, an American Law Professor of note, warns us, however, that a rigid instrument is not more secure than any other against sudden violent and destructive changes, and may be more easily overturned by the assaults of faction than it possibly could be, were its principles, having their roots deep in the nature of the people, expressed only in unwritten usages.

Dwindling Respect for Law.—One never knows what a flexible Constitution is developing into. It keeps the same names for everything, while the realities are constantly changing. The King ceased to rule in England in 1689.¹ The Rotten Boroughs saw the end of their day in 1832. The Commons became admittedly supreme in 1911. The middle classes yielded power to the working classes in 1924. All through the years, the judges were masters in their own house. Everything was done in accord with law. With the advent of a fuller democracy one is uncertain whether respect for the law will last. The people cannot quite govern themselves. They may object to being ruled by a class differing socially from the mass. They may tend rather to favour government by State officials. A bureaucracy may come into being, hidden from view, but placed above the law, depending absolutely on administrative, or departmental, law, and ignoring Parliamentary legislation and the ordinary courts. Lord Hewart, C.J., has noted this tendency and its attendant dangers.

Developments of the Flexible British Constitution.—Fools vaticinate.

¹ George III, from 1760 to 1810, won back many monarchical privileges, lost since the accession of William and Mary, and especially under George I and George II. The Restoration of 1660, which purported to be a Constitutional Monarchy settlement, resulted in thirty years of absolutism, the monarchs being assisted by an efficient Privy Council.

We cannot foretell the development of the British Constitution, but at the same time we cannot help noting that under the flexible British instrument, personal liberty was a matter of very slow growth. The Star Chamber Court, the State encouragement of spies and common informers, censorship of the press, the partial administration and iniquitous interpretation of the law of libel, the individual liability of members of a jury for their verdicts, things all permissible under the Common Law, had to be overcome. Even to-day there is no redress from interferences with liberty if the interests of the army be involved. Sir James Graham as Secretary of State announced in 1844 that he availed himself of his position, to open letters going through the Post-Office. His successor has not been prevented from following suit into our own day. The State still insists on its right to impress men for the British Navy.¹ But in the main, freedom has grown from more to more.

Magna Carta may be cited as the first step in the slow business of reform. After five hundred years of partial reality the Great Charter was reinforced by the Habeas Corpus Amendment Act (1679),² and twenty-two years later, after one of those bloodless revolutions characteristic of flexible Constitutions, Habeas Corpus was made still more a certainty by the fixing of judicial tenure (not, however, fully realized until 1 George III, Cap. 23) in the clause "*Quamdiu se bene gesserint*," in the Act of Settlement (1701).³ The same Act wiped out the "Non Obstante" doctrine endorsing the Divine Right of Kings and the Dispensing Power of James II (on which had rested the verdicts in *Godden v. Hales*,⁴ and *Thomas v. Sorrell*).⁵ *Bushell's case*⁶ established the liberal principle that a jury was not liable for a verdict repugnant to the judge. In 1695, the press censorship lapsed. In *Ashby v. White*⁷ and *Paty v. White*,⁸ the House of Commons set itself above the courts of the land, and asserted its exclusive right to try, and to determine what constituted, parliamentary and election disputes. The difficulty was only solved by Queen Anne's proroguing of Parliament; but in effect the judges won through. In the *Middlesex Election Case*,⁹ the Commons again unsuccessfully asserted peculiar privileges as against the citizen in enforcing its qualifications for membership. In *Brass Crosby's case*,¹⁰ the Commons attempted to prevent public reports of their proceedings from being issued. Though technically beaten, Crosby won in principle. Of old the King was the danger in the State. In the eighteenth century Parliament threatened to become just as arbitrary, did not the courts hold it in check.

¹ In accord with *Rex v. Broadfoot*, [1743] XVIII, S.T. 1326-58 and *Rex v. Tubbs*, [1776] 2 Cowper 517.

² 31 Car. II, Cap. 2.

³ 12 and 13 Wm. III, Cap. 2.

⁴ (1686), 2 James II, XI, S.T. 1195-99.

⁵ (1674), Vaughan's reports 331-59.

⁶ (1670), Broom 115-39.

⁷ (1703), 3 Ld. Raym. 320.

⁸ Select Constitutional Documents, 268.

⁹ (1769) Robertson, pp. 330-6, Lecky, *H. England* III, Cap. X.

¹⁰ (1771), XIX, State Trials 1146, Robertson 337.

In 1792 was passed Fox's Libel Act,¹ which placed the liberty of the press in the hands of the jurors and overrode Lord Mansfield's opinion in the *Dean of St. Asaph's case*.² The Act made it competent for a jury to decide whether the words complained of in an action for libel did or did not constitute libel. Lord Campbell's Libel Act (1843) further protected personal liberty by allowing the defendant to plead the truth of the libel, and its publication in the public interest: the publisher to be held not liable if he gave no consent. The cases instituted by John Wilkes (1763-65),³ and the contingent cases of *Entick v. Carrington*⁴ and *Leech v. Three of the King's Messengers*,⁵ established the illegality of General Warrants, and nullified the attempt of the Commons to effect legislation by resolution. The right of parliamentary petition is now generally recognized. The rights of meeting and association are nowhere more fully honoured than in England (where the decision in *Beatty v. Gillbanks*,⁶ is quoted with pride). Nowhere too, is freedom of discussion more respected. The repeal of Acts against Dissenters, and the Catholic Relief Act of 1829⁷ ended religious persecution in the main. Life imprisonment for debtors has ceased. Negro slavery is non-existent since Lord Mansfield's decision in *Somerset's case*.⁸ As in America and France, however, restrictions on foreign settlers have increased. The extradition of the Duc de Château-Thierry (1917) was demanded by the French Government as an act of comity to allies, and for the first time in known history the British Home Office complied.⁹ Yet such is personal freedom in England to-day that on a wrongful deprivation of liberty the following five remedies are, among others, open to the aggrieved person whether alien or citizen: (1) civil proceedings for damages in respect of malicious prosecution, false imprisonment, or assault; (2) criminal prosecution for assault, battery, or false imprisonment; (3) suing out a writ of Habeas Corpus to obtain release; (4) in exceptional cases, an application for a writ of certiorari; (5) an appeal from the verdict of a jury to the Court of Criminal Appeal (under 1916 Act), or from the Magistrates to Quarter Sessions.

With the growing power of the bureaucracy, however, and the all

¹ 32 George III, Cap. 60. ² (1783), XXI, State Trials 1034, Robertson 346.

³ *Wilkes v. Lord Halifax* XIX, S.T. 987; *Wilkes v. Wood* XIX, S.T. 1167.

⁴ [1765] XIX, S.T. 1044.

⁵ XIX, S.T. 1026 (for all these cases see Robertson, pp. 299-336).

⁶ 9 Q.B.D. 314 (K.S.C. 392).

⁷ 10 George IV, Cap. 7.

⁸ (1771-2), XX, S.T. 80-82.

⁹ *Ex parte Duc de Château-Thierry*, [1917] 1 K.B. 922. The Duke, a resident in England before the war, contended that he was a political refugee, and unfit for military service. The Court confirmed the order for deportation, and held that the Government could choose a ship, and place the Duke on board; (per contra *ex parte Sarno* (1916), 115 L.T.R., where Lord Reading doubted the State's right to choose the country to which the alien is to go). See also the daily press for the weeks ending 12th and 19th May, 1928, dealing with the stay in England of Prince Carol of Rumania, and compare with the treatment of the Hungarian Count and Countess Karolyi in U.S.A. 1925. See Ryan, *Declining Liberty*.

too apparent absence of such defined powers as obtain under a rigid Constitution, the courts tend more and more to encroach on the liberty of the citizen as against the State and its officials.¹ A notable exception is the decision in *Rex v. Home Secretary ex parte Art O'Brien*.² One other such is *Attorney-General v. De Keyser's Royal Hotel Ltd.*³ The Crown held that compensation for the seizure of property during the War was an act of grace. Lord Swinfen compelled payment as a duty. So frightened was the Coalition Government of 1916-18-22 of the independence of the judges that the Indemnity Act, 1920, and the War Charges Validity Act, 1922, were passed to legitimize every illegality committed by Government departments during the War. But the courts cannot be forever proof against an encroaching officialdom. In *Feather v. Regina*,⁴ the Court held that the Admiralty can infringe a patent granted to a private citizen by the Board of Trade. In *Bainbridge v. Post Master General*,⁵ a post office van ran over Miss Bainbridge, and it was held that no compensation could be awarded, save from the driver's wages. In *Dunn v. Regina*⁶ an official can have no redress on dismissal, after having given up another post on the understanding that he would be employed for a certain number of years. In *Mighell v. Sultan of Johore*,⁷ a breach of promise case, Miss Mighell can get no satisfaction, because the man who, as Albert Baker, wooed her, happens to be an Indian potentate. The citizen in such cases is shown to be helpless before the State. In actions for breach of contract however, as distinct from actions in tort, the exigencies of business transactions have driven the advisers of the Crown to admit responsibility in certain cases.

Otherwise the financiers would refuse to have dealings with them. No wonder then that Dicey lived to revise his estimate of the value of the French *Droit Administratif* under which a special tribunal is set up to deal with torts committed by the State and its servants.

Ireland.—In considering flexibility and rigidity, Ireland is well worth more than passing notice, because hers is one of those interesting constitutions which have been at times rigid, and at times flexible. It is maintainable that, in spite of Sir Edward Poynings' Drogheda Enactments,⁸ the Irish Parliament (though not the Executive) was sovereign,⁹ and its Constitution therefore flexible, until the passing of 6 Geo. I,

¹ See the admirable House of Lords Debate of May 1, 1928 (vol. 70, no. 27, p. 912), on the removal from the Rating and Valuation Bill of clause 4 which empowered the High Court to decide on questions of rating law. The Marquis of Reading, Viscount Haldane and Lords Merrivale, Hanworth, Hewart, Dynevor and Darling, as lawyers supported the omission of the clause.

² [1923] 2 K.B. 261.

³ [1920] A.C. 508.

⁴ 6 B. and S. 257.

⁵ [1906] 1 K.B. 178.

⁶ [1896] 1 Q.B.C.A. 1164.

⁷ [1894] 1 Q.B. 149.

⁸ [1495] 10 Henry VII, Cap. 52, legalizing in Ireland all English legislation then in force in England. 10 Henry VII, Cap. 4, a surrender by the Irish Parliament of its power to pass measures without the prior consent of the Sovereign and English Council.

⁹ See Richey, *Short History of the Irish People*, Cap. X, pp. 232-4, and Stubbs and Baxter, *Irish Forms and Precedents* (Butterworth 1910), Introduction, p. lii.

c. 5 (Robertson 120) in 1720. Thence until 1782, Ireland had a rigid Constitution, with revisionary powers vested in the Parliament of Great Britain. It may be no coincidence to note that the standard of justice immediately declined. At the trial of Swift's printer, Harding, in 1724, for the publication of the "Fourth Drapier's Letter," the Dublin Grand Jury nine times championed the liberty of the subject, by nine times bringing in a verdict of "Not Guilty." Each time they were sent back by Whitshed, C.J. There followed a prolonged scene lasting for eleven hours, when the jury brought in a special verdict, leaving the decision to the judge himself. A second trial was contemplated, but wiser counsels prevailed, and a *Nolle Prosequi* was entered.

Wolfe Tone's Case.—To the student of Political Science the Irish sovereign legislature and flexible Constitution of 1782 are cause for just pride. The appointment of judges was vested in the Lord Chancellor of Ireland, and never perhaps was a more independent Bench known. The noble action of Kilwarden, C.J., in *Wolfe Tone's Case*,¹ stands out as an example for all the world. In '98 Tone was captured, tried before a court-martial in Dublin and sentenced to be hanged. John Philpot Curran made an application to the King's Bench for a writ of Habeas Corpus, on the ground that as a civilian, Tone was not subject to punishment by a court-martial. Lord Kilwarden immediately granted the writ. Tone's guilt had been admitted. The judges were inimical to the Rebellion. Ireland was in the midst of a revolutionary crisis. Yet in spite of these circumstances, the King's Bench vindicated in no uncertain way the liberty of the subject, and were able to enforce the vindication. The enforcement must cause just pride when we reflect on the helplessness of the U.S. Supreme Court in cases like *Ex Parte Merryman*, *infra*. Under similar circumstances, and under a Constitution about to become rigid, in the case of *Rex v. Portobello Barracks, Commanding Officer ex parte Erskine Childers*,² the writ was refused by Molony C.J. on the ground that a state of war existed in Ireland, and the civil courts were unable to discharge their duties.³

In weighing the merits of flexibility, the words of the Swiss de Lolme constantly recur to one. "The theory of the British Constitution," he said in effect, "is that Parliament can do everything save make a woman a man, and a man a woman." Montesquieu, another foreigner, caps the quotation by the remark that under the flexible British Constitution, the State would go down rapidly to perdition whenever the

¹ [1798] XXVII, S.T. 614.

² (1922), 67, S.T. 128.

³ On March 23, 1923, ended the Irish Civil War. On June 18, the application of Madame Markievicz and other internees for writs of Habeas Corpus was refused by the Dublin High Court on the ground that the country was still in a state of war. On August 1, 1923, in spite of resistance on the part of the State, writs of Habeas Corpus were granted by Molony, C.J., in the case of two internees, on the ground that in all the circumstances it could no longer be said that a state of war existed. To meet this the Irish Government pressed through the Public Safety Emergency Powers Bill, which enabled them to keep prisoners interned at their discretion.

Legislature became as corrupt as the Executive. That state of things may be closer at hand than some of us dare admit.

Rigid Constitutions.—A flexible Constitution is only possible in a non-democratic State, or in a democratic State like Great Britain which has developed slowly and well along the path of ordered progress. The younger nations, and, above all, Federal States, find safety in a written Constitution which defines the powers of the various constituent authorities. Written and rigid constitutions go back to the British Colonial Charters of the seventeenth century, which later became embodied in the Constitutions of the constituent states of the North American Union. Napoleon endorsed the principle, and, helped by the fertile but ridiculous Sieyès, littered Europe with rigid Constitutions. The Treaty of Versailles in 1919 gave another lease of life to rigidity. All the post-War states of Europe adopted written instruments. It was Bryce who, in 1884, first suggested the classifications, rigid and flexible. His idea of a rigid Constitution was a Constitution which puts certain organic or fundamental articles outside the control of an ordinary parliamentary (majority-of-one) vote ; either, by vesting the constitutional changes in a larger Parliamentary majority (as in Serbia, Poland, Czechoslovakia, and Sweden) or, by requiring a joint session of a bicameral legislature (as in the Third French Republic), or, by appeal to the people (as in the Irish Free State, Esthonia, Mexico, Australia, and Switzerland) or, by reserving the amendment for some outside body, or bodies (as in the United States, where the consent of at least thirty-six of the forty-eight State Legislatures is necessary).

Declining Faith of the People in Parliamentary Supremacy.—However we take it, the system of amendment under a rigid instrument of Government points to a denial by the people of absolute confidence in the Parliamentary system, the sovereignty of which is thus limited by these methods of checks and balances. Closely allied to this mistrust, and altogether depending upon it, is the grave problem of the interpretation of rigid Constitutions under modern democracies. Under the flexible British Constitution the courts have power to render a statute nugatory. Should Parliament not object, the decision of the court stands for all time. But the parliamentary sovereignty of the State can always negative the judicial decision, by a mere parliamentary majority of one. Interpretation ultimately rests with Parliament. Under a rigid Constitution the people intimate their distrust of Parliament, and the interpretation is therefore vested either in one branch of Parliament, executive as against legislature, or *vice versa* ; in the judiciary ; in the people themselves by means of a referendum ; or in an *ad hoc* Convention of Interpretation, and chosen by the people or by Parliament. It will readily be understood that the parliamentary interpretation of a rigid instrument, no matter how theoretically perfect, is no interpretation at all. Very often it nullifies the rigidity of a Constitution, because the executive are able to plead the Constitution as a bar to parliamentary

discussion of certain matters, while preventing any extra-parliamentary discussion, or interpretation.¹ The system of Referendal Interpretation, and the *ad hoc* Convention have rarely been tried, because the people would be too inexperienced, and the specialists too impossibilist. In the main the United States have given the lead. Constitutional interpretation is usually vested in the higher courts of each state. The arrangement has pleased the judiciary. It has not been unpleasing to the people; but so jealous is the executive of this encroachment on its ultimate power of interpretation that at times serious deadlocks have been known to arise. In constitutional theory, the interpretative power of the Supreme Court is the last word, short of amendment. In actual fact, the judges are given no means of enforcing their decisions and have to depend on the executive, as a matter of grace, to help them out. Constitutionally deprived of the power of deciding fundamental questions, the executive is apt to sulk, and to refuse to assist the interpretational authority.

Powerlessness of the Interpretational Authority.—This is well illustrated by a series of United States cases affecting personal liberty.

In 1832 the Federal Supreme Court ordered the State of Georgia to release Cherokee Indians imprisoned under a Georgian statute which Marshall (Chief Justice 1801-1835) had declared invalid. President Jackson refused to put the judgment into effect, adding, "John Marshall has pronounced his judgment: let him enforce it if he can." In *Ableman v. Booth*² the State Supreme Court of Wisconsin released a criminal imprisoned by the U.S. Supreme Court, and then ordered its Clerk to disregard a Writ of Error from the U.S. Supreme Court; and the Wisconsin Legislature declared a decision of the U.S. Supreme Court of no force, and "a positive defiance, the only remedy." Taney (1777-1864, and Chief Justice from 1836 till his death) held that he had no remedy of enforcement against the State.

In *Magoffin* (Governor of Kentucky) v. *Dennison* (Governor of Ohio),³ Taney, C.J., held that neither the courts nor the executive had any coercive power over a State Governor who failed to do his duty in delivering a murderer up to justice. A Habeas Corpus case which has not received sufficient attention is *Ex Parte Merryman*.⁴ President Lincoln,

¹ *Brown v. Leyds*, Transvaal State, [1897]. The Court had held by a majority that a law passed without having been submitted to the people during the period prescribed by the Constitution (Grondwet) was unconstitutional and therefore void. The Legislature, by Resolution directed the President of the South African Republic to require from every judge on pain of dismissal a declaration, that he would recognize as valid every law passed by the Volksraad and not inquire whether a law conformed with the provisions of the Grondwet. Kotze, C.J., refused to make this declaration and was dismissed. See Bryce, *Studies in History and Jurisprudence*, Essay vii, p. 378. For Bryce's classification of rigid and flexible Constitutions, see Essay iii, p. 124 and Essay x, p. 503.

² [1858] 21 Howard, 506. Tyler, *Memoir of Taney*, 608.

³ [1860] 24 Howard, 66.

⁴ (1861). Reported in full in Tyler's *Memoir of Taney*, pp. 420 and 646.

newly elected, began to lean on the military arm. Every citizen of Maryland was suspected of being engaged in plots against the Federal Government. Merryman was arrested by soldiery, and committed to the custody of the General commanding Fort McHenry. A writ of Habeas Corpus was issued by Taney, C.J., at Chambers, directed to the Commandant of the Fort, ordering him to produce Merryman's body before the Chief Justice.¹ This officer refused to comply with the writ, giving as his excuse that :—

(1) Merryman was arrested by the orders of the Major-General Commanding in Pennsylvania, upon a charge of treason, in being publicly associated with . . . a company having in their possession arms belonging to the U.S., and avowing his purpose of armed hostility against the Government.

(2) The Commandant of the Fort was duly authorized by the President of the United States to suspend in such cases the writ of Habeas Corpus, for the public safety.

Taney immediately ordered, . . . "that an attachment forthwith be issued against General George Cadwalder, for a contempt in refusing to produce the body—in accord with the demand of the writ of Habeas Corpus returnable and returned before me to-day, and that said attachment be returned before me—to-morrow." The attachment was issued as ordered. Next day the Marshal's return to the writ ran : ". . . I proceeded to Fort McHenry for the purposes of serving said Writ. I sent in my name at the outer gate ; the messenger returned with the reply, . . . that there was no answer to my card, and therefore I could not serve the writ as I was commanded. I was not permitted to enter the gate." Chief Justice Taney subsequently laid the following written opinion before the President : ". . . the President claims, not only the right to suspend the writ of Habeas Corpus at his discretion, but to delegate that discretionary power to a Military Officer, and to leave it to him to determine whether he will, or will not obey the judicial process that may be served upon him. No official notice has been given to the Courts of Justice, or to the Public by Proclamation, or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return,—I had thought it admitted on all hands that the privilege of the writ could not be suspended except by Act of Congress. . . ." The President ignored the Chief Justice, then a patriarch of eighty, and ignored his own constitutional obligation to ". . . take care that the Laws be faithfully executed. . . ."

Dangers of Conflict between Executive or the People at large with the Interpretational Authority.—As a corollary to this tendency on the part of the executive to nullify the decision of the Supreme Court, there is the almost impish delight of the Supreme Court in putting the executive in a fix. Under the flexible British Constitution the judges, however much they may dislike the acts of legislature or executive, have no inclination to embarrass them unless they stand on very sure ground ; for Parliament has the simple and immediate remedy of reversing the decisions of the courts, by legislation. But under the rigid United States Constitution, the Supreme Court is aware that its decisions,

¹ See Bryce, *American Commonwealth* (Part I, Chap. xxiv, 1st ed., vol. i., p. 358).

however galling to legislature or executive, are binding until at least thirty-six of the forty-eight State legislatures come round to the opinion of the federal authorities. This power is at times favourable to the liberty of the subject, as in *Chisholm v. The State of Georgia*,¹ where the Supreme Court decided that an action did lie against Georgia at the suit of a plaintiff, citizen of another State. It took a Constitutional Amendment to reverse this decision which was held an insult to State dignity. Often, however, this interpretative supremacy of the court is dangerous to personal freedom. Indeed so alarmed were the French at the prospect of a conflict between the judiciary and executive, that judges have been absolutely forbidden to pronounce on matters constitutional, thus in effect killing the rigidity of the instrument.² The danger is emphasized in several United States cases.³

A Judicial Decision can Lead to War.—An obiter dictum of Taney, C.J., that the "Missouri Compromise" of 1820, enacting that slavery should cease in all States North of Latitude 36° 30' was unconstitutional, and therefore void, and his *dictum* that negroes, being considered by the Constitution as only property, could not, when freed by their masters, thereby become citizens of the United States, and that this disability extended to all of negro blood, and for all time, were largely responsible for precipitating the Civil War. There was here no question of enforcement, which the enraged executive under Lincoln could refuse to carry out. It was a question of constitutional interpretation which could not be evaded by the executive save with the assent of three-fourths of the Constituent States. The realization of the impossibility of thus bringing about the Amendment, determined the North on War; and it was only on the conclusion of the terms of peace that Lincoln and his successors were able to get the State legislatures to override Taney and the Supreme Court of the United States in Amendments Nos. 13 (1865), and 14 (1868).

Conflicts with the Working Classes in the Democracy.—In *Allgeyer v. Louisiana*⁴ the Supreme Court used its interpretative power to extend the meaning of the term "liberty" in a clause (known as the "Due Process" clause) of the above mentioned Fourteenth Amendment of the Constitution to include the right of a man ". . . to be free in the employment of all his faculties—to live and work where he will—to pursue any livelihood or avocation, and . . . to enter into any Contracts which may be proper, necessary, and essential, to his carrying to a successful conclusion the purposes above mentioned. . . ." This development was an important, and well-appreciated, protection of the natural rights of the individual, but in its turn it has led to a less pleasant development which in English law is non-existent since 1850 (when Parke B., Lord Wensleydale, was immediately overruled by Act of Parliament when he

¹ (1789), (2 Dall.) 419.

² See also *Brown v. Leyds*, Transvaal State, *supra*.

³ *Dred Scott v. Sanford*, [1856] 19 Howard, 393 and Tyler's *Taney*, 517.

⁴ (1896) 165 U.S. 578.

had re-legalized the relay, or "shifts," system, against which the working classes had been fighting for thirty years, and had thought to have abolished in Lord Ashley's "Ten hour Day" Act of 1844). Thus in *Lochner v. New York* (1905),¹ the U.S. Supreme Court took the "Due Process" clause to mean a very wide freedom of contract; declared the Ten hour Baker's Day void, as "an unreasonable, unnecessary, and arbitrary interference with the personal liberty of the subject, and the right to enter into contracts." The courts have thus empowered the economically strong to oppress the economically weak, and have applied the decision in like cases.²

Thus it will be seen that the earlier decisions construing this "Due Process" clause, began quite recently (1896), and went no further than the unpretentious assertion of the liberty to follow the ordinary callings. Later, that unconscious generality was expanded into the Benthamite dogma, "liberty of contract," and the latest act in the expanding process has rendered unconstitutional any legislation by Congress or by the States protecting wage-earners, even women, against being constrained to work for less than living wages. In addition, it is an effective bar to laws providing insurance against sickness, and unemployment, and to all new labour legislation for the benefit of adult workers. Thus a Constitutional Amendment to ensure the economic liberty of former black slaves, has been perverted by means of judicial construction to the grave injury of the economic liberty of whites and blacks. The only remedy is a cumbrous process of Amendment by thirty-six out of forty-eight State legislatures.

The Injunction in labour disputes has been deemed needful by some forty State courts in order to enforce the "Due Process" clause. In the railway shopmen's strike after the War, some three hundred injunctions were granted, depriving the strikers of one or other kind of reasonable liberty. In England, one such injunction was granted in 1900. The Trade Disputes Act, 1906, put an end to the remedy.

The kinds of cases we have been discussing are of course unusual; but it is submitted that the difficulties of each type are inherent in rigid Constitutions. If there be no interpretational authority outside the legislature and executive, rigidity is a delusion. If there be such an extra-parliamentary interpretational authority, it has to be assured of the powers of enforcement, or it is liable to become a danger to the welfare of the State by reason of its tendency to reach knaggly and

¹ *People v. Lochner* (1902) 76 N.Y.S. 396, 73 App. Div. 120. (1904) 69 N.E. 373; 177 N.Y. 145; 101 Am. St. Rep. 773. Reversed: *Lochner v. the People of the State of New York* 25 S. Ct. 539; 198 U.S. 45; 49 L. Ed. 937.

² *Coppage v. Kansas* (1915), 236 U.S. 1; *Hitchman v. John Mitchell et Al.* (1917), 245 U.S. 229. Parallel case with the English one of *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717, but decided in the opposite way. A law protecting women wage-earners held unconstitutional by Court in *Adkins et al.* constituting the minimum Wage Board of the *District of Columbia v. Children's Hospital of the District of Columbia* (1922) 261 U.S. 525.

torvous decisions, its refusal to revise previous decisions, and its tendency to stand too much on its dignity.

French Droit Administratif.—A word about *Droit Administratif*. France is so afraid that justice will not be done by the individual as against the State and its officials, that it has provided special courts and a special law for dealing with the nation's torts. The *Droit Administratif* was for years derided by writers who lived under flexible Constitutions. Dicey changed his mind in 1914, and in 1927 we have Sir John Marriott in his *Mechanism of the Modern State* admitting that under the Third Republic, the remedies of the subject against the State are easier, speedier, and infinitely cheaper than they are to-day in England. "It has become a maxim of Constitutionalists . . . that the *Conseil d'État* is the great buffer between the public and the Bureaucrat." (Marriott quoting C. K. Allen.) Through the genius of French lawyers, the *Droit Administratif* has become a separate system of law, just as the Chancellor's Equity has developed in England under Bacon, Cowper, King, Hardwicke and Eldon. The kind of *Droit Administratif* which obtains in the Irish Free State, as revealed in the recent Dundalk case of the *State v. Larrissey*,¹ in which a minor State official refused to give evidence in a District Court before submitting it to her department, does not appear, however, to be the most ideal type which could be adopted.

The Prohibition Tyranny.—In 1859, the year of Macaulay's death, and of the appearance of Darwin's *Origin of Species*, Mill prophesied that when the majority had ceased to look upon the Government as representing an interest opposite to that of the public, and began to feel that the power of the Government was *their* power, and its opinions *their* opinions, personal liberty would be as much endangered by State invasion as it already was by public opinion. This has been realized under the British Constitution, no less than under the American, but for many reasons Dr. John A. Ryan's analysis of the control of the liquor traffic under a rigid Constitution is well worth our attention. The Eighteenth Amendment of the United States Constitution prohibits for beverage purposes the manufacture, sale, import and export of intoxicating liquor. This Amendment had to be put into effect by an Act of Congress known as the Volstead Act. But this goes even beyond the powers conferred by the Amendment, in that it outlaws the traffic, forbids the possession, manufacture, or transportation of liquor for consumption by self or friends. Treating becomes a crime. These prohibitions, since they exceed the terms of the Constitution, are at any time liable to be held void by the Federal Supreme Court. Meanwhile they are an unjust interference with personal liberty, because the drinking of intoxicating liquor is *per se* neither morally wrong, nor an injury to society. The same is true of individual actions which are subsidiary to, or closely allied with the act of drinking, to wit, making liquor for one's own use, transporting it for one's own use, and sharing

¹ *Irish Independent* and *Irish Times*, September 3, 1927.

it (not selling) with friends. So long as these potations and incidental actions do not interfere with the public peace and order, they should not be forbidden by the State. Their prohibition cannot rightfully be made an end which the civil law seeks to maintain, or to attain. Another clause defines all liquor containing more than one half per cent. alcohol as intoxicating. Yet another clause tells us that the mere possession of alcohol shall be *prima facie* evidence that such liquor is kept for the purposes of being sold, bartered, given away, or otherwise disposed of, in violation of the provisions of the Act. The one clause is an arbitrary contradiction of facts concerning the capacity of alcohol to cause intoxication. The other is a tyrannical rule of interpretation and administration. But the best is yet to come. The Act winds up with the clause: "All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." This unconstitutional clause is neither expressly, nor implicitly contained in the Eighteenth Amendment.

This leads directly to the consideration that under a rigid Constitution the people will tolerate, with approval even, the worst tyrannies simply because the State is deemed impeccable. Where the maxim, "The King can do no wrong," is held a lie, the theory that the State can only do what is right, is worshipped as a dogma. "Penal laws must be construed strictly," said Blackstone long ago. That is, laws, like the Volstead Act, carrying a penalty must be interpreted and administered in such a way as to inflict the minimum of inconvenience and hardship which is inseparable from the penal provisions. The restrictions on liberty contained in the law must not be construed to include more than the language necessarily compels one to include. The theory even antedates Blackstone, and is older than the Common Law. Even in the reign of James II, we find his notorious Chancellor, Lord Jeffreys, declaring in *Brason v. Dean*,¹ that a penal statute is not retrospective—a statement approved by Lord Birkenhead (in *Fourteen English Judges*) as sound law in 1926. Notwithstanding this, we have a judge of the Irish Free State High Court, who is an interpretational authority under Art. 65 of a Constitution, now the most flexible of instruments, but about to become almost irreparably rigid on and after December 6, 1938, declaring that the Public Safety Act of 1927—a penal statute—shall be held to extend to punishment of a crime committed one month before the passing of the Act; and this in spite of Art. 43 of the Irish Constitution, which says that no *e.p.f.* law shall be passed.²

¹ 3 Mod. 39. The Canon Law principle is *Odiosa sunt restringenda*.

² Mr. Kevin O'Higgins, Vice-President of the Irish Free State Executive Council and Minister for Justice, was assassinated on July 10, 1927. The Public Safety Act, 1927, was passed on August 11, 1927. On September 8, 1927, the Vacation Judge acceded to the State's Motion for Mandamus and Certiorari in the case of Seán MacBride, accused, under the Public Safety Act, 1927, of the O'Higgins murder. The judge thus ignored a golden opportunity for interpreting the spirit of the Constitution. *Irish Law Times*, vol. lxi, nos. 3162 and 3163 (September 3 and 10, 1927). *Irish Times*, and *Irish Independent*, September 1, 6, 7, 9, 1927.

We may appear to have criticized rigid Constitutions unduly ; but, while admiring rigidity, we have desired to point out that life under a rigid Constitution is not all beer and skittles. If there be an independent judiciary, with a satisfactory means of appointment, it does not much matter what form the Constitution takes ; it is a case of roundabouts and swings. Yet it is always well to have the subject's rights and liberties set down in one concise instrument, as in a rigid Constitution. Because of this, it is interesting to note some of the Organic Articles in the written Constitutions which have come into being since the outbreak of the War of 1914. We shall look at some of the clauses not unconnected with personal liberty.

Post-War Constitutions.—(1) **Ex Post Facto Laws.**—These are forbidden by the Kingdom of Jugo-Slavia, the Serbs, Croats, and Slovenes (1921)¹ ; the Irish Free State (1922)² ; the Republic of Poland (1921)³ ; the Republic of Esthonia (1920)⁴ ; the German Reich (1919)⁵ ; and the Republic of Mexico (1917).⁶ On paper, the Mexican Instrument is probably the most perfect ever devised. Certainly, it is the best drafted since 1914, with the Jugo-Slavian draft coming next. In actual practice, neither would appear to have worked quite well. King Alexander has just declared a dictatorship (January, 1929).

(2) **Individual Liberty.**—This is guaranteed by the Irish Free State,⁷ Jugo-Slavia,⁸ Poland,⁹ the Reich,¹⁰ the Republic of Austria (1920),¹¹ Esthonia,¹² the Republic of Czechoslovakia (1920),¹³ and Mexico.¹⁴ The Jugo-Slavian clause has been copied by several other States. Under it a man cannot legally be arrested unless a charge by a competent authority, and in writing, be served on him within 48 hours of the arrest. Within three days of his arrest he may apply for a writ of Habeas Corpus. If there be no such application, the authorities must communicate the charge to the court within 24 hours of the completion of the third day, and within two days the court has power to annul the charge. Public officials are liable for illegal deprivation of the subject's liberty. Mexico adds that no contract for the abridgment of personal liberty, by reason of labour, education, or religious vows, can be tolerated by the State¹⁵ ; and, in accord with true Benthamite principles, judicial costs are forbidden absolutely.¹⁶

(3) **Inviolability of the Dwelling.**—This is guaranteed by the Irish Free State,¹⁷ Jugo-Slavia,¹⁸ Poland,¹⁹ Esthonia,²⁰ Czechoslovakia,²¹ Mexico,²²

¹ Part 2, art. viii.² Art. xliii.³ C. 5, art. xcvi.⁴ C. 2, art. ix.⁵ Part 2, s. 2, art. cxvi.⁶ Title I, c. I, art. xiv.⁷ Art. vi.⁸ Part 2, art. v.⁹ C. 5, arts. xcv., xcvi., cc., cviii., cxi.¹⁰ Part 2, s. I, art. cxiv.¹¹ S. 7, art. cxlix., incorporating under s. 2D, art. xlv. (a) (1), of the Imperial Law of October 27, 1862. (*R.G.Bl.* 87.)¹² C. 2, art. viii.¹³ C. 5, art. cvii.¹⁴ Title I, c. I, art. xvi.¹⁵ Title I, c. I, art. v.¹⁶ Title I, c. I, art. xvii.¹⁷ Art. vii.¹⁸ Part 2, art. xi.¹⁹ C. 5, art. c.²⁰ C. 2, art. x.²¹ C. 5, art. cxii.²² Title I, c. I, art. xvi.

the Reich,¹ Austria,² and the Kingdom of Denmark (1915).³ The Jugo-Slavian clause has again been copied extensively. A written warrant must be produced. Two citizens must be present at the search and a certificate of all articles taken by the authorities, together with a written, and signed, statement of the result of the search, must be handed up to the householder on leaving.

(4) **Right of Association.**—This is guaranteed by Jugo-Slavia,⁴ the Irish Free State,⁵ and Poland.⁶ There is again an interesting Jugo-Slavian clause requiring that 24 hours' notice be given to the police when an open-air meeting is contemplated.

(5) **Religion.**—Freedom is guaranteed by Jugo-Slavia,⁷ the Irish Free State,⁸ Poland,⁹ Esthonia,¹⁰ and Mexico.¹¹ Mexico, however, prohibits the existence of monastic orders¹² or the teaching of religion in any primary school.¹³ Denmark¹⁴ and Poland¹⁵ give preference to the State religion, and there is a much-copied Jugo-Slavian clause¹⁶ which refuses to consider the plea of religion as an excuse for non-performance of military service or civil duties. Poland makes religious instruction compulsory for all until eighteen years of age.¹⁷ The immense influence of Rousseau on the framers of rigid Constitutions is a phenomenon to which sufficient attention has not yet been paid. The religious clauses are invariably taken *en bloc* from the "*Contrat Social*"; often with unguessed consequences.

(6) **Freedom of the Press.**—This is guaranteed by Jugo-Slavia,¹⁸ Poland,¹⁹ and Czechoslovakia,²⁰ only. In Poland, no responsible editor can be a member of the Lower House,²¹ nor may there be a subsidized press.²² Jugo-Slavia, in press prosecutions, makes author, editor, publisher, and printer jointly responsible.²³

(7) **Education.**—Elementary is free throughout Europe. All grades, including the Universities, are free in Jugo-Slavia,²⁴ Poland,²⁵ Mexico,²⁶ and the Russian Socialist Federal Soviet Republic (1918).²⁷

(8) **Secrecy of Letters.**—Letters are inviolable in Poland,²⁸ Jugo-Slavia,²⁹ Esthonia³⁰ (where telegrams and telephonic communications are included), Czechoslovakia,³¹ Mexico,³² and the Reich.³³ Following Sir James Graham's precedent of 1844 in England, the Irish Free State denies this right to her citizens.

¹ Part 2, s. 1, art. cxv.

² S. 7, art. cxlix., incorporating the Imperial Law of October 27, 1862. (*R.G.Bl.* 88.

³ S. 8, art. lxxix.

⁴ Part 2, art. xiv.

⁵ Art. ix.

⁶ C. 5, art. cviii.

⁷ Part 2, art. xii.

⁸ Art. viii.

⁹ C. 5, arts. cxi-cxvi.

¹⁰ C. 2, art. xi.

¹¹ Title 1, c. 1, art. xxiv.

¹² Title 1, c. 1, art. v.

¹³ Title 1, c. 1, art. iii.

¹⁴ S. 1, art. iii., s. 2, art. v.

¹⁵ C. 5, art. cxiv.

¹⁶ Part 2, art. xii, par. 2.

¹⁷ C. 5, art. cxx.

¹⁸ Part 2, art. xiii.

¹⁹ C. 5, art. cv.

²⁰ C. 5, art. cxiii., s. 1.

²¹ C. 2, art. xxiii.

²² C. 5, art. cv.

²³ Part 2, art. xiii.

²⁴ Part 2, art. xvi., s. 2.

²⁵ C. 5, art. cxvii.

²⁶ Title 1, c. 1, art. iii.

²⁷ Part 2, c. 5, art. xvii.

²⁸ C. 5, art. cvi.

²⁹ Part 2, art. xvii.

³⁰ C. 2, art. xiv.

³¹ C. 5, art. cxvi.

³² Title 1, c. 1, art. xxv.

³³ Part 2, s. 1, art. cxvii.

(9) **Trade Unions and Combinations.**—These are permitted in Jugo-Slavia,¹ Poland,² Esthonia³ (except in cases where they be held to interfere with the peace of the citizens); the Reich⁴; and Czechoslovakia,⁵ (except in cases where a conscious violation of the spirit of the clause be proved).

(10) **Amendment of Rigid Constitutions.**—(a) Referenda are guaranteed by the Irish Free State,⁶ Esthonia,⁷ the Reich⁸ (if Parliament disagree), Austria,⁹ and Denmark.¹⁰

(b) Intra-Parliamentary Amendment is guaranteed by Jugo-Slavia,¹¹ Poland,¹² Czechoslovakia,¹³ Mexico,¹⁴ and the Russian Socialist Federal Soviet Republic.¹⁵ It is noteworthy that in no Constitution drafted since 1785 has the inter-State extra-parliamentary system of revision been adopted. This is due less to the patent merits of the system, than to the needlessly cumbrous features of the American model. In practice, revision systems are found to be either intra-parliamentary, or referendal.

It is well that these provisions should exist. Yet it cannot be too often stressed that they are but counsels of perfection, and that it remains to be seen whether they can be put into practice, and worked consistently in accord with the ideal. Much will hinge on the educational contacts, appointment, and tenure of the Judiciary. Even in England, Lord Hewart, C.J., would have us believe there exists a Baconian attempt to set up lions under the Treasury Bench.¹⁶

In France, ambiguity and excessive rigidity have caused the July Revolution, and the Coup d'État. On July 25, 1830, Charles X invoked Art. 14 of the rigid Restoration charter of 1814, to declare that in a case of urgency he had the right, without consulting the Legislature, to issue Ordinances having the force of law. He accordingly issued four Ordinances. The first suppressed the liberty of the press. The second dissolved the Popular Chamber before its reassembly. The third modified the electoral system so as to enfranchise only the higher taxpayers. The fourth convoked the Electoral Colleges for September 13, 1830, in order that the two Chambers should meet on September 28. Ordinances 1, 2, and 3, were taken by the people to fall rather under the head of laws. Charles's action was therefore held to be in the nature of a *coup d'état*, and on August 2 he was forced to abdicate in favour of the Duc de Bordeaux, although he was, in fact, succeeded by Louis Philippe.

¹ Part 3, art. xxxiii.

² C. 5, art. cii.

³ C. 2, art. xviii.

⁴ Part 2, s. 5, art. clix.

⁵ C. 5, art. cxiv.

⁶ Arts. xlvii. and l.

⁷ C. 3, arts. xxix.-xxxiv. and c. 10, arts. lxxxvii.-lxxxix.

⁸ Part 1, s. 1, art. xviii. and part 1, s. 5, art. lxxvi. ⁹ S. 2D, arts. xlv.-xlv.

¹⁰ S. 10, art. xciv. ¹¹ Part 12, arts. cxxv.-cxxvii. ¹² C. 6, art. cxxv.

¹³ C. 2, art. xxxiii. ¹⁴ Title 8, art. cxxxv.

¹⁵ C. 9, art. xlix. and lia.

¹⁶ See also Sir John Marriott, M.P., in *Fortnightly Review*, July 1928. In a controversy which may yet become acute, it would be well to distinguish, clearly, between the menace of Administrative, or Departmental, Law, and the French *Droit Administratif*. This last has developed into something quite other than that which those would have us believe who ignore French idiom, customs, and law, and regale themselves with the earlier editions of Dicey.

Between 1791 and 1875, France has had twelve written Constitutions. Under the Eighth Rigid Constitution (of November 4, 1848), the President of the restored Republic was elected by universal suffrage for four years (like the United States President), and was ineligible for re-election. Calculating on his popularity with the masses, Louis Napoleon was able to override excessive rigidity, and had his period of office extended in January 1852 for a further period of ten years. This step led to the setting up of the Second Empire in the following December.

It is for this reason that the ambiguity of the Irish Free State Constitution is fraught with grave peril. Art. 12 vests the sole power of making laws in the Oireachtas (the King and both Houses). Against this, Arts. 47, 48, and 50 guarantee both Referendum and Initiative. But in truth the future of the Constitution is far from certain. The only question is whether its flexibility is to be unequivocal or esoteric, whether our model is to be Britain or France. Mr. Cosgrave's eleven new Amendments (his Government has introduced sixteen since 1925), change completely the character of the Instrument. The Senate is now elected by a joint parliamentary session instead of by the people. There has been a repeal of Arts. 47 and 48 which guarantee the Initiative and Referendum. In substance, however, Art. 50, guaranteeing constitutional amendments by Referendum, remains still intact. But constitutional amendments by joint parliamentary session have been mooted. It cannot too often be repeated that, no matter how complicated, any species of intra-parliamentary amendment to rigid Constitutions negatives rigidity. If, however, the Parliament of Northern Ireland were to perform this task for the Free State, and the Free State were to reciprocate for the flexibly rigid instrument, amphoteric after the Canadian model, set up in Ulster under the Government of Ireland Act, 1920, we should have in each case a rigid system of amendment based on extra-parliamentary authority, after the example of the United States, but without the tedious American State-majority provisions. This form of amendment would be as good as any other and might well help towards an understanding by North and South, each of the other's problems. To speak of intra-parliamentary amendment as rigidity is verbiage. That way lies flexibility, and if we want flexibility, the best approach would be to scrap the amendment to the last sentence of Art. 50, which compels rigidity on December 6, 1938; and to substitute an annual, or triennial, Bill, on the lines of the Mutiny Act,¹ deferring rigidity until the year, or three-year period, be up. If at the end of one such period, such a deferring Bill should fail to have been re-introduced, or passed, the Constitution would automatically become rigid. If only in the interests of political science, the experiment would be worth a trial.

¹ 1 Will. & Mary, c. 1.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[Contributed by PROFESSOR BERRIEDALE KEITH, D.C.L.]

Report of the Ceylon Commission.—We owe it to Mr. Montagu and Lord Chelmsford that State papers on constitutional issues are now written in a lively and attractive style which compares most favourably with the average governmental publication. The Special Commission on the Constitution has presented the Colonial Secretary with an account of the constitutional issues¹ in the island which is so vivid and compelling that it is easy to ignore the hiatuses and inconsistencies in the arguments. The one defect of form is undoubtedly its length; the subject-matter after all is limited, and there is unquestionably a tendency to diverge into minor details which should have been left for the consideration of the local legislature and the Colonial Office. The report, none the less, is a valuable piece of work, and the endorsement of its principles by the Colonial Secretary gives it immediate interest and utility.

The Constitution of 1924.—The existing Constitution came into operation in 1924 and marks the result of the natural demand for fuller control of their government by the people of Ceylon which developed rapidly from 1917. The Commission hardly appears to be just to the colonial Government in its strictures on the method by which that Constitution was worked. It is clear that in these days of telegraphic communication the policy of the local government was dictated by the Colonial Office, and that, if any blame is to be given,² it should have been directed rather to the Secretary of State than to his subordinates, whose action he could at any time have checked. But it is dubious if blame is in place. The Commission itself ends by recommending a course of action which seems to be the natural outcome of the steps already taken under the existing Constitution, and, if their views are sound, it may fairly be held that the present Constitution has served a useful purpose in leading up to the end now aimed at. Nor can it be supposed that the Colonial Secretary can have had any misunderstanding of the trend which the development of the Constitution must take when the alterations of 1923 were made. The Order in Council then passed created a Legislative Council in which 12 officials were confronted by 37 unofficial members, all save three elected, and over which the Governor was not to preside save on ceremonial occasions. The Governor was indeed given the power to declare the passing of a Bill or vote of paramount importance, in which

¹ Parl. Paper, Cmd. 3131. Price 3s. 6d.

² *Ibid.*, pp. 20, 22, 24, 28.

case only the votes of official members are counted ; but, apart from this power, which was clearly of an extraordinary character and was never actually used, though the threat of its employment has been adduced to compel the grant of increased salaries, he was dependent for fresh legislation and supply on the Legislative Council. It is clear that a constitution of this kind, in which the Executive was wholly under the Governor, while the Legislature was independent, could only work by mutual accommodation, and the Government proceeded to admit the Legislature to share in the control of administration. The formal provision in the Constitution for this purpose was badly conceived, as the Commission point out ; the Governor was allowed to add three members of the Legislature to the Executive Council, but those selected ceased *ipso facto* to be elected members of the Legislature and became nominated members, thus being placed in an inferior and invidious position. On the other hand, on the Finance Committee the Government was represented only by three officials, while the elected members sat *en masse*, with the result that into the hands of this body control of administrative detail rapidly passed, while this control was supplemented by the habit of appointing *ad hoc* committees to the absurd number at one time of fifty-five to consider various problems. There is here a reminiscence of the conditions in the American Colonies in the pre-revolutionary period, when Assemblies asserted themselves and deprived Governors of any real executive control, but in this case the administrative officers appear to have been willing to meet the legislators more than half way. The Commission, which disapproves the procedure adopted, none the less recognizes the valuable training in administrative matters thus achieved by members of the Legislature, and it is on this fact that its own recommendations are based.

Rejection of Responsible Government.—It is natural that many in Ceylon, including the majority of the Legislative Council as it exists, should have urged that the logical step now to be taken is the concession of responsible government, and it is interesting to note the arguments which have induced the Commission to reject that obvious solution (pp. 31 ff., 41 ff.). It is pointed out that there does not exist as yet that party system which is at the basis of the sound working of responsible government. Indeed, it is refreshing to find so hearty an admiration of the system at a time when it is suspect ; it is extolled as giving stability to Governments, rendering politics intelligible to the public and diminishing intrigues. The obvious argument that the party system must be developed by the grant of responsible government and can hardly exist before it—which might be corroborated by the history of the Dominions—is met by the argument that, if party divergences were to develop, it would probably be on a racial or caste basis, and not on political, constitutional or economic lines. It is pointed out also that even in the United Kingdom the existing system tends to crush the individual, whereas the people of Ceylon have shown their great interest in adminis-

tration, while again most pressing issues of an administrative character must soon be faced. Not only has much still to be done for agriculture, but the growth of industrial conditions has made apparent the need of factory legislation, workmen's compensation, housing, a poor-law, prevention of sweating, etc. Hence the Commission has devised proposals of a remarkable kind, which aim at giving to the representatives of the people a very high degree of direct control not merely of legislation and finance but of administration. The distinctive features of the system include (1) the denial of ministerial responsibility in the usual sense, partly because ministers would be exposed to pressure from their constituents and others of a very exacting character, and (2) the introduction of committees¹ with many of the functions of ministers, while a certain measure of retention of European control is provided, partly through the presence of officials independent of the Legislature in the last resort, and partly through the reserved powers accorded to the Governor. It is, it must be said, obvious that the Constitution as it is proposed can work only through goodwill on the part of all concerned, and it is not difficult to predict that it can serve only as a preliminary and transition stage to the better system of responsible government which has proved itself to work adequately in the Dominions.

The State Council.—The Legislative Council, as it now stands, will disappear and be superseded by a larger Council, described as the State Council, which, like the Senate of the United States, will meet both in executive and in legislative session. Its numbers will be increased to a maximum of 80, 65 elected members, three officials, the Chief Secretary, Attorney-General, and Treasurer, and up to 12 members nominated by the Governor, if he deems it essential thus to secure proper representation for all sections of the community. The franchise will be enormously extended by sweeping away property, income and literacy² conditions for the franchise; it will be given to all men over 21 and women over 30 who have resided five years, so that in a few years the electorate may be 1,850,000 in lieu of the present 200,000. The increase is clearly justified by the powers to be given to the Council, and there will be sympathy for the Commission's denunciation of communal franchises as having merely accentuated racial and caste distinctions. The members of the new Council will proceed to form seven committees chosen by ballot; each committee, again, thus chooses a chairman, who will be a minister; the seven ministers and their committees will be in charge of the departments of home affairs (including police), agriculture, local administration, health, education, public works and communications. To three officials responsible to the Governor, styled Officers of State, will be allocated the portfolios of the Chief Secretary, including external relations, defence, drafting of legislation, public service administration and audit; of the Treasurer, including collection, custody and disbursement of revenue, the budget

¹ The analogy of League of Nations Committees is adduced.

² English literacy is demanded for membership of the Council (p. 90).

and estimates, investments, supervision of departments, and advice; and of Attorney-General, including the administration of justice and legal advice. The ministers and the three Officers of State will make up the Board of Ministers, but the officers will not vote and will be essentially advisory to the ministers, and there will be no imitation of the control exercised over finance, even in transferred subjects, in the Indian provinces by the Executive Councils of the Governors there. Collective responsibility will be restricted to the budget and estimates, including supplementary estimates; otherwise each minister with his committee will be expected to manage the subject referred to him, under responsibility to the Council. Resignation of the ministry as a whole will necessitate a fresh election, but it will occur only when the budget or estimates are rejected, or a vote of no confidence is passed, and this will normally occur only when the Council is not satisfied, and refers back some measure for consideration, and the ministers then refuse to alter their view. The Council is expected freely to consider all matters reported by the several committees, and to refer back or revise them when need be, while the committees are to decide by majorities, the chairman deferring to the majority, or, if he prefers, expressing dissent and inviting the Council to decide. But it is not contemplated that there should be "one-man" rule or that chairmen should insist on resigning, unless they find themselves out of touch regularly with their committees. Each committee would normally initiate necessary legislation in respect of its subject-matter, subject to consultation between the chairmen and decision by the Board of Ministers to ensure that there was no conflict of interests. Two standing committees¹ would be composed to which Bills would normally be referred, though estimates would go to a committee of the whole house and reference to small expert committees might be resorted to in appropriate cases. Bills proposed by private members would be referred to the appropriate committee for consideration in the first instance.

The Council and the Civil Service.—The idea of administrative business being thus decided by committees, with constant reference for approval to the Council, is decidedly surprising, and it suggests confusion in the management of public affairs. The Commission is aware of the difficulty, for it pins its faith to the definition by General Orders of the matters which are to be dealt with by the heads of departments and those which must come before the committees. Moreover, it will be necessary to make clear what issues can be disposed of by the committee with mere formal approval *ex post facto* by the Council and the Governor, and what matters must be approved by these authorities before action is taken. The Commission has apparently been led by the case of the Education Department to imagine (p. 61) that a delimitation will be practicable; its procedure is governed by a code; the administration could be left to

¹ Committee A would include the members of the first four executive committees, B those of the other three.

the head of the department, any departure from it or issue where it did not apply or is of doubtful application being left to the committee. It is perfectly clear that even in the Education Department such a demarcation would leave constant opportunity for appeal to the committee, and the Commission in other cases has not found it possible to lay down even provisional lines. The lot of the civil servant who attempts to claim rights apart from the committee under which he serves will be unhappy, and no doubt the average man will follow the line of least resistance, with the result that the committees will run the departments entirely. This procedure will be facilitated by the Commission's very frank and proper recognition that there must be a rapid process of increasing the number of Ceylonese in the higher branches of the administration ; there is no possibility now of denying their capacity for such work, and this fact will simplify the problem of effecting the necessary improvements in the economic and social legislation of Ceylon. At present the high salaries properly demanded by Europeans impose an utterly unfair burden on the people ; there must be a readjustment to reduce salaries to reasonable dimensions on the basis of selection of Ceylonese with additional allowances for persons of European domicile, in so far as such are employed. It is proposed (pp. 137-42) to give to the Secretary of State wide powers of control over salaries, and the proportion of Ceylonese and Europeans employed, while the Governor will be responsible for securing the just treatment of personnel, as well as the due selection for appointment of officers in all save the minor posts. No elaborate Civil Service Commission with powers similar to that in India or in the Dominions is suggested, but merely a small official committee advisory to the Governor.

The Functions of the Governor.—It is clear that the Commission propose to place upon the Governor functions which are far beyond the power of any man adequately to perform. Apart from his special relation to the Civil Service in all matters of importance, he is to sanction both the administrative and the legislative proposals of the State Council, and he is expressly to be denied the aid of any advisory body, the old Executive Council disappearing, and its functions being handed over to the heads of departments, the minister and his committee, or in exceptional cases to the Governor personally. The existing rules as to the exercise of the Governor's assent to legislation are to be extended widely : he may not assent to any Bill imposing differential restrictions on persons of any community or religion ; prejudicing the rights of public servants ; affecting the financial stability of the island ; relating to questions of public defence or public security ; affecting trade outside the island, docks, harbours, shipping or other matters of naval, military or aerial interest or of Imperial concern ; or affecting the administration of justice. This rule will not, of course, apply to cases where he has received prior authority from the Colonial Office. He is to be given additional powers beyond those, already his, of assent, refusal of assent, or reservation ; he may simply refer back with suggestions of amendment ; or declare

that an important principle is involved, so that the Bill must be passed by a vote of two-thirds of the members ; or assent subject to a suspension of not above six months. In every case of his exercise of his powers he must report home for approval or disallowance. In cases of paramount importance he may himself legislate without any vote of the State Council. It is proposed that the same principles as govern his assent to legislation should be applied in the field of executive matters ; the Secretary of State would then be called upon periodically to review the Governor's action with power to disallow it, just as legislation, though assented to by the Governor, may be disallowed. The Governor will retain powers in respect of recruitment to the Civil Service and of conditions of service, and in respect of the departments of the Officers of State he will nominally have full control ; but in effect these officers will have to account for the actual administration of their departments to the Council, which is to control both policy and finance, so that their position will be distinctly anomalous. In matters affecting defence and external interests the Governor will have a free hand, but the Commission are satisfied (pp. 77, 78) that Ceylon is fully aware of the benefits of the British connexion, and that there is no reason to fear action aimed at the best interests of the Empire or the special affairs of the people of Great Britain who have commercial, financial or other connexion with the island. This testimony, which is undoubtedly deserved, is of fundamental importance as justifying the trust placed in the wisdom of the island Legislature by the Commission. It is in fact clear that the average Governor cannot attempt to control the State Council whether in legislation or executive action. He will normally tend to accept its views on both heads, and rather endeavour to prevent than invite imperial intervention. Any other line of action would mean constant friction, and it would be difficult to expect British Governments to deem it worth while seeking to overrule local wishes. Ceylon is happily free from those fundamental issues which render it so difficult to decide British policy in India. Her defence from external aggression is secured by the British Navy, whereas India is faced by the necessity, before self-government can be fully achieved, of building up effective forces of her own which will secure her frontier. There are caste differences in Ceylon—the Commission repeats (p. 91) the old fallacy that caste is foreign to the teaching of the Buddha ; there are racial differences, there is the question of the Mohammedans, and of the immigrant Tamils from India ; but there is nothing seemingly insoluble to the extent of the gulf in India between Hindu and Mohammedan. The scheme proposed by the Commission virtually means surrender of control to the people of Ceylon, who are given by it so wide a franchise as to secure that, if they use the vote, they will be duly represented. Whether the machinery they have chosen is wise, whether it would not have been better frankly to concede responsible government, is a matter of opinion ; the desire of the Commission to invent something novel is commendable, even if it is difficult not to feel that, if the Ceylonese have the political

capacity to work the Commission's elaborate construction, they would probably have worked even better the simple and well-trying plan of responsible government. It may be that, as a transition scheme, the new suggestion has merits, but they are not exactly obvious. It must be added that valuable suggestions (pp. 108-23) are also made for the extension of local government, the application to it of the principle of election in lieu of nomination as a general rule, the extension of the franchise, and other changes, all of which seem eminently reasonable, while the main principle supported is a necessary complement of the decision to recommend the grant of so wide a measure of self-government in the central administration.

Constitutional Changes in British Guiana.—In curious contrast with the rapid development of autonomy in Ceylon is the disappearance of the measure of self-government in matters of finance formerly possessed by the colony of British Guiana. The mere fact that an Imperial Act was necessary to enable the measure to be brought into operation is an interesting reminder of the curious constitutional history of the colony. The result of this was that in matters of ordinary legislation the Government could assert its supremacy, but in finance a compromise existed under which, in return for the periodical grant of a civil list, a remarkable degree of financial authority was left to the elective majority in the Combined Court, to which it fell to pass the annual Tax and Customs Duties Ordinances and to discuss issues of expenditure.¹ The Crown undoubtedly retained a general right to legislate by Order in Council, but, apart from questions of the uncertainty of the right to legislate thus to alter this feature of the Constitution, it was obviously proper that Parliamentary authority should be given to so vital a change, when it was opposed by the elected members of the Legislature. The justification for the measure was, as usual, financial; the present needs of the colony are for sound finance in order to permit of development, and there can never be sound finance when the Government is not responsible for it. To make the Government responsible to the Legislature was clearly impossible under existing conditions in British Guiana with its mixed population and its Indian immigrants, so that the only alternative was to give the Government responsibility by enabling it to override the Legislature or to control it. The new Constitution, which is issued under the Imperial Act and which has been received apparently with satisfaction even by those who objected to the change, is one of the simple Crown Colony type.²

The New Constitution.—The Order in Council of July 13, 1928, under the British Guiana Act, 1928, follows closely the recommendations of the British Guiana Constitution Commission of 1927. The new Legislature will have normally a majority for proposals of the Government, for it will contain ten official members, two *ex officio*, the Colonial Secretary

¹ The power to cut out or diminish items existed, but, of course, not to increase.

² Parl. Paper, Cmd. 2841, 3047.

and the Attorney-General, and eight selected by the Governor, and nineteen unofficial members, of whom fourteen will be elected. A somewhat unnecessary clause provides that any official nominated as a member of the Legislature who will not act will *ipso facto* forfeit his office ; the same result could always be achieved by exercise of the royal prerogative of removal from office. The franchise is distinctly limited ; it is noteworthy that, whereas the Ceylon Commission has recommended a wide franchise and an abolition of a literacy test, the British Guiana Order adopts both property and literacy tests. The wisdom of this restrictive policy may be doubted, when the Legislature in any case is not to be paramount and is not to control the Executive. As a final safeguard to assure the Government power to carry out a consistent policy, the recommendation of the Commission is adopted, and provision is made by s. 62 that any matter requiring a vote or enactment of the Council may be decided by the Governor in Executive Council against a majority of the Legislative Council, providing that the Governor shall certify that the decision is in his opinion necessary in the interests of public order, public faith or other first essentials of good government, including the responsibilities of the colony as a component part of the British Empire (a term happily not banished from official terminology). Prior to such a decision taking effect, it must have the approval of the Secretary of State, unless in a case of urgency, when the Secretary of State may disallow it, and objections by members of the Legislative Council must be transmitted to the Secretary of State. The provision differs in one point from the recommendation of the Commission. That body desired to place the responsibility on the Governor alone and not on the Governor in Council. The change has necessitated a formal clause (s. 2) in the Order making it clear that the Governor may overrule his Executive Council in this matter, and it must be doubted whether it would not have been wiser to accept simpliciter the recommendation of the Commission. When responsibility must be taken, it is best assumed by an individual.¹ The fullest power to legislate by Order in Council is reserved, as authorized by the Imperial Act, but wisely the Legislative Council is permitted by ss. 41 and 58 free power to amend the unessential portions of the Order, and is given authority, subject to reservation, to vary other parts, thus becoming a constituent as well as a legislative body, and obviating the need of reference to Parliament or to the Privy Council for change. As the security of the Government is safeguarded, concessions are made, for it will now be possible for any member of the Legislative Council to propose any matter, whereas under the old régime in legislation the initiative rested with the Governor. There is, of course, the usual rule that taxation or appropriation must have the prior approval of the Governor. Supporters of female suffrage will note with disappointment that, while women may, if qualified in their own right, vote, they may not be elected members, a discrimination which seems illogical ; while legal purists will

¹ This is fully accepted in India.

observe that the provision in s. 66 as to the effect of non-observance of the royal instructions in legislation is already secured by the Colonial Laws Validity Act, 1865.

Capitulations and Constitutional Change.—In the case of Ceylon and British Guiana alike the constitutional changes thus made or proposed illustrate the impossibility of binding colonies by the terms of capitulations or similar instruments. That the terms on which territory becomes British should be carefully observed is manifest, but the obligation is one of a political, not legal, character unless and until it is enacted as law, and, when so enacted, it can be modified by law. The old Constitution of British Guiana would never have been allowed to exist in its cumbrous form but for the fact that it was agreed in the original capitulations that the Government should be maintained as formerly, and, though this could not be literally carried out, the principle of giving a measure of financial control to the elected members was an inheritance from the Dutch system, or at least from the theory of that system. It would manifestly have been foolish to allow this relic of antiquity to block a change which, on the whole, was doubtless in the interest of the colony. So again the Ceylon Commission was confronted with a demand on behalf of the Kandyan chiefs for the separate treatment of their province on the score of the explicit promises made in the Convention of 1815 under which Kandy was taken over (pp. 103-8). It is clear that this convention has long since been disregarded; it is also probable that the rebellion of 1817-18 cannot be regarded as having cancelled it, for the local government disabled itself from using this argument by recognizing at various subsequent dates the validity of the convention. The decision, therefore, taken in 1832 after the report of a Commission to disregard the principle of separate treatment of the Kandy country was doubtless a breach of the convention. But it is clear that, whatever wrong was then committed, could not now be remedied, and the Kandyan claim for distinctive treatment would manifestly result in retardation of the progress of the island as a whole. It is satisfactory, however, to note that the Commission has recommended that, despite considerations of cost and convenience, arrangement should be made for occasional meetings of the State Council at Kandy, a privilege which it is also suggested should be conceded to Jafna for the benefit of the Tamils. Undoubtedly the Ceylonese should, as a nation, learn to know one another better, and to legislate for the interests of the whole people, and not merely of the Low Country.

Canada and the Treaty Power.—The inevitable expansion of the treaty-making activity of Canada has brought with it in a more insistent form a serious legal problem, the solution of which will have to be given by the Privy Council in due course, or may even have to be effected by an amendment of the Constitution. Treaties affecting Canada now are normally made in two ways: either they are agreed upon at Geneva, where the Canadian representatives act on the direct authority of the

Dominion Government, or they are signed by a Canadian plenipotentiary acting under full powers granted by the King, on the request of the Dominion Government, through the Imperial Government as an intermediary. Instances of the former are the Conventions under the Labour provisions of the treaties of peace, of the latter the International Sanitary Convention of Paris of 1926, and the Czecho-Slovak Trade Convention of 1928 signed at Ottawa. But a third course is possible: thus the commercial treaties with Spain of 1922 and 1927, arranged by the Imperial Government, and the agreement of 1924 regarding treatment of companies, are not signed for Canada, but they permit the application of the treaties to the Dominions if these Dominions so desire, and Canada, therefore, is able to accept their terms, just as she was given the opportunity, if she so desired, to accept the Locarno Treaty. There is yet another possibility due to the existence of the British Empire, whence Canada profits. Thus many treaties provide that, whether or not a Dominion accepts the treaty, goods produced therein shall enjoy in the foreign country most-favoured-nation treatment, so long as the goods of that country are accorded in the Dominions similar treatment.

Canadian Legislation as to Treaties.—It is clear that as regards all these treaties legislation in Canada may be necessary, and in fact a large number of measures were in 1928 under consideration by Parliament, which was asked to approve of the Geneva Opium and Slavery Conventions of 1926 and of the International Sanitary Convention,¹ and to pass Acts to make effective in Canada the Spanish treaties, and the Czecho-Slovak convention, and to provide that Canada would give most-favoured-nation treatment to the goods of Estonia, Latvia, Lithuania, Portugal, Rumania and the Serb-Croat-Slovene Kingdom so long as Canadian goods enjoy similar treatment in these countries. The legislation involved in these cases normally can be brought easily within the ambit of the specific powers of the Dominion Parliament under s. 91 of the British North America Act: but there are cases which cannot be brought within this section, and Mr. Bennett, the leader of the Opposition, indicated as an example the provisions of the Spanish treaty of 1922, Art. 3 of which deals with the acquisition of property, reminding the House of Commons that succession duties are entirely a provincial matter, so that the Dominion Parliament was thus imposing restrictions on the provincial powers. Similarly the terms of the companies agreement with Spain would fetter provincial authority in dealing with companies.

The Treaty Provision of the British North America Act.—As the Prime Minister indicated, the issue—which assumes very serious proportions in view of the problems affecting the St. Lawrence in respect of which provincial rights of property may be interfered with by Dominion projects of agreement with the United States—depends on the interpretation of s. 132 of the British North America Act, which runs: "The Parliament

¹ Existing legislation was deemed sufficient to allow acceptance, but Parliamentary approval was desired on constitutional grounds as usual.

and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, acting under treaties between the Empire and such foreign countries." There is no doubt that this clause was drawn up under circumstances very different from those now prevailing, and it has naturally been suggested that the Courts would be likely, if any issue arose on its interpretation, to lay down that they must act on the meaning which the Act had when enacted in 1867, just as the Supreme Court has ruled that women were not eligible as Senators because the term "qualified persons" used in the Act could not apply to women, as they were then disqualified from public office. The analogy, however, is not altogether cogent; the question in such cases is one of degree; to admit females to senatorships under an Act which definitely excluded them is a different matter from holding that the wide terms of s. 132 may not be interpreted to cover a procedure which is changed indeed since 1867, but not essentially different. It seems, therefore, that we need not accept the suggestion that a treaty concluded in the new form for Canada by a plenipotentiary under full powers is not a treaty between the Empire and a foreign Power. It is impossible to hold that the terms of s. 132 apply merely to treaties affecting the whole Empire; the framers of the Constitution were familiar with the famous reciprocity treaty of 1854, concluded, thanks to the diplomacy of Lord Elgin, for the benefit of the United Province of Canada and the Maritime Provinces, and the only difference between the old form of treaty and the new is merely that the plenipotentiaries are Canadian nominees. They are appointed by the King with the advice of the Imperial Government, though that advice is based on the wishes of Canada, and such treaties are sufficient, in my opinion, to rank as treaties binding on Canada and the provinces under s. 132 of the British North America Act. The case is other with the conventions agreed to by the representatives of Canada under the procedure of the Labour clauses of the treaty of peace of 1919. These conventions do not seem to me to be treaties within s. 132, though they could be made such by adopting the formal procedure of casting them into ordinary treaty form, and having them signed by plenipotentiaries. Moreover, where such conventions affect provincial interests, it is clear,¹ as the Supreme Court of Canada has held, that the proper and constitutional course is that the provincial Legislatures should be asked to take steps, if desired, to make the conventions applicable, and that the Dominion Parliament should not be invited to take any measures.

Dominion and Provincial Powers.—The vital issue, of course, is how far the Dominion is entitled by the use of the treaty power to interfere with the provincial sphere of legislation. It is possible to argue that the power given in s. 132 must be read subject to s. 92 defining provincial powers; but this would merely nullify the effect of s. 132, and to interpret

¹ *In re Legislative Jurisdiction over Hours of Labour Reference*, [1925] S.C.R. 505.

that section thus would render it otiose. It must, therefore, be conceded that the section does give Canada a power to override, and so it has been held¹ in the rather interesting case of the validity of the Migratory Birds Convention Act, 1917, which was passed by the Dominion Parliament to secure the carrying into effect of the Convention of August 16, 1916, for the protection of migratory birds in Canada and the United States. It must be remembered that much the same issue of the power of Congress to override the States in matters regulated by treaty has arisen in the United States, and this very convention has been upheld by the Supreme Court. Mr. Justice Holmes's judgment² puts the matter in the most favourable light :

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off, and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and, were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.

It is, of course, impossible to argue from the terms of one Constitution to the other, but the reasons animating the Supreme Court are such as would clearly appeal powerfully to the Privy Council, all the more so since, with the obsolescence of Imperial legislation for the Dominions, it cannot now be argued that the Imperial Parliament could intervene to correct omissions by the provinces or to prevent one recalcitrant province holding up Canadian action.

Restrictions on Dominion Power.—That is not to say that the Dominion can by treaty vitally affect the provincial powers. The Privy Council has clearly laid it down that the Dominion and the provinces will be protected in their powers against invasion and there is every reason to suppose that, just as the Dominion power as to trade has been limited definitely,³ so the treaty power would not be allowed to be exercised in such a way as vitally to invade the sphere of the provinces. Just as under war conditions the Dominion could pass Acts which under peace conditions would be invalid, it may well be that a treaty made by the Dominion in urgent national interests, such as that regarding migratory birds, would be upheld by the Privy Council where an invasion of provincial rights on minor issues from the national point of view would be disapproved. This legal uncertainty must add to the natural considerations of constitutional propriety which urge that Canada should normally act in

¹ *The King v. Stuart*, [1925] D.L.R. 12. For the Convention see Parl. Paper, Cd. 8476.

² *Missouri v. Holland*, 252 U.S. 416, 435.

³ *Toronto Electric Commrs. v. Snider*, [1925] A.C. 396. See *Journal of Comparative Legislation*, Third Series, vol. vii, pt. i, pp. 61-8.

matters essentially provincial only with provincial assent, while on the other hand it would be pedantic to insist on such assent for arrangements in substance Dominion but incidentally impinging on provincial issues. The matter is probably one of degree, and there is no reason to anticipate that Canada will be ready to act rashly, especially in view of the disastrous results which would come to pass if a Canadian treaty proved to be impossible of execution because of the insufficiency of the legal powers of the Dominion. It is true that Courts would be reluctant to place the Dominion in such a position, but they are bound by the British North America Act and the interpretations given thereof, so that the provinces have a reasonable security against improper intervention by means of the treaty power in their domestic concerns.¹

The Union and the German Commercial Treaty.—It is difficult not to sympathize with General Smuts in his protests on November 21, 1928, against the trade policy adopted by the Union Government in its treaty with Germany. The basis of the treaty runs entirely counter to the doctrine that trade relations within the Empire should be matters *sui generis* and that foreign Powers should not be allowed to claim rights accorded only to parts of the Empire. This is the doctrine for which Canada carried on her long and ultimately successful trade war with Germany,² and it is noteworthy that Canadian negotiations with Germany have hung fire in 1928. The Union, on the other hand, has conceded the doctrine of most-favoured-nation treatment in the sense that, while Germany may not claim the advantages already secured by the United Kingdom or any Dominion, she will be entitled to any advantages in future granted to the United Kingdom. As General Smuts points out, this deprives the United Kingdom of any motive to make further arrangements for preferences to Union products, seeing that her chief rival Germany would obtain automatically any preferences granted by the Union in return. General Smuts also stressed the indifference shown by the Union Government to the help which might be derived from the operations of the Empire Marketing Board, and suggested that unfavourable impressions might be derived from the attitude of the Government in regard to trade relations with the United Kingdom. He was doubtful also of the policy announced by the Government of raising to the status of *chargés d'affaires* the trade representatives of the Union in Europe, seeing that these officers had really no political functions to perform. Germany certainly has every reason for satisfaction as being treated on equal terms,³ despite her tiny demand for Union products, with the United Kingdom, which is so generous a purchaser from the Union. For a parallel treaty it is necessary to go back to the abortive Bond-Hay Convention of 1902, which would, if it had ever been ratified, have

¹ Keith, *Responsible Government in the Dominions* (1927), i, 579-81.

² Parl. Paper, Cd. 1781.

³ The issue of German acquiescence in the Union's design of the annexation of South-west Africa may have been of importance.

placed certain classes of United States imports into Newfoundland on the same footing as British imports, and it is rather curious that the action taken should have been adopted despite the existence in the United Kingdom of a Government admittedly anxious to promote in every way Imperial preference. The Imperial Government, of course, was consulted under the new procedure before the treaty was concluded, but naturally also the final decision was taken without requiring its approval, for it is axiomatic that the Dominions have tariff autonomy. The concessions, moreover, do not raise any direct question of differentiation in favour of a foreign Power, an issue which might have raised more energetic protests from the United Kingdom and the other Dominions¹; under the arrangement imposed by the sense of the Union Parliament on the Government in 1925 there is no question at present of giving any foreign Powers concessions withheld from the United Kingdom, and it may be hoped that this policy may be adhered to. Doubtless the new arrangement has been influenced by political as well as economic considerations, but due allowance must be made for the great skill of German negotiators as compared with the representatives of the Union. There can be no doubt that in the earlier days of Canadian negotiations much was gained by British participation, and it may be expected that South Africa in due course will fare better in her commercial agreements, just as Canada now has representatives fully equal to dealing successfully with the diplomats of any foreign Power.

The Dominions and the United Kingdom.—While Canada has established its legation at Paris and His Majesty has duly received letters of credence from the French President in favour of a French minister at Ottawa, and the Irish Free State contemplates diplomatic representation both at Paris and Berlin, New Zealand remains content with reliance on British diplomacy. Nor has it even been deemed necessary to supersede the Governor-General as the channel of communications with the Imperial Government, though liaison officers have been appointed. Moreover, the governmental decision to adopt the British Nationality and Status of Aliens Act of 1914 is a gratifying proof of the desire of the Dominion to co-operate with the Empire. Only a misunderstanding could so long have kept New Zealand from accepting a measure which has been adopted in the other Dominions and which in no wise diminishes Dominion autonomy. In connexion with this measure Sir Francis Bell maintained his thesis² that the general provisions of the Imperial Act do not apply to New Zealand. His doctrine rests on the view that the Imperial Parliament can legislate for the Dominions only by express enactment, not by necessary intendment. But such a doctrine appears to be without any legal authority; what is clear is that an Act will not be held to apply to the Dominions lightly, but an Act defining British nationality *prima*

¹ See Keith, *Responsible Government in the Dominions* (1927), ii, 855, 856.

² Parl. Debates, Aug. 1, 1928, p. 940. I am indebted to the Hon. Sir James Allen, G.C.M.G., K.C.B., for calling my attention to this important debate.

facie applies to the whole Empire, and, if there were any doubt, it would be removed by the facts (1) that the Act was only passed after full agreement by the Imperial Conference and by the Governments concerned, and (2) that the provisions of the Act as to naturalization were specifically limited in application to exclude the Dominions, unless the relative part of the Act were expressly adopted by the Dominions. It is clear that Sir F. Bell recognized the weight of opinion against his view, and on another point it is possible to agree entirely with Sir F. Bell. He held that, under the existing law, despite the resolution of the Imperial Conference of 1926, it would rest with the Imperial and not the Dominion Government to advise the Crown as to the right of disallowing, or on reservation of assenting to, a nationality measure passed in New Zealand, though, of course, there is no reason to imagine that effect would not at once be given to Dominion wishes. This accords with Mr. Baldwin's insistence immediately after the conclusion of the Conference of 1926 that matters of reservation remained unaffected by the Conference resolutions. Sir James Allen,¹ who demonstrated the propriety of New Zealand action to assimilate its law of naturalization to the British law and supported the proposal, raised also the question of the fuller use of the High Commissioner as the proper means of communication in England between the New Zealand Government and the British Government. The point is of interest because both in the Commonwealth and in the Dominion officers have been sent to England to represent informally the Prime Minister, and it is clear that, unless confusion is to result, it must be made plain that these officers are to act under the High Commissioner, and not as in any measure superseding his official activities.

The Two Houses in Tasmania.—The Legislative Council of Tasmania has issued in September 1928 the text of the case² submitted by the Government of Tasmania to Mr. H. I. Cohen, K.C., and of his opinion on the legality of the submission to the Acting Governor and his assent to the Appropriation Bill of 1924 despite the fact that it had not been passed by the Legislative Council, and the similar action of the Governor as regards the Land and Income Taxation Bill (No. 2), 1924.³ It is not in the least surprising to find that Mr. Cohen was wholly unable to support the view of the Government that the action taken was defensible, and it is obvious why the opinion should have so long been withheld from publicity. The only argument of any sort used by the Government of the day was a citation from Todd,⁴ and Mr. Cohen has no difficulty in showing that, apart from the doubt as to whether Todd would have applied his view to the case of Tasmania, his view had no application whatever to the relations of two Houses, both of which are elective. Todd,

¹ Parl. Debates, Aug. 1, 1928. pp. 206, 207 (July 6).

² Parliamentary Paper No. 21 of 1928. I am indebted to the Hon. F. B. Edwards, M.L.C., for the paper and much other valuable information.

³ *Journal of Comparative Legislation*, Third Series, vol. vi, pt. iv, pp. 205, 206.

⁴ *Parliamentary Government in the British Colonies* (2nd ed.), p. 709.

of course, wrote his valuable treatise under the influence of his deep studies of the position of the House of Lords, and of his conviction that the Canadian Parliament ought to follow the model of the British Parliament. He did not live to see the emphatic assertion by the Canadian Senate of its own views and the imposition on the Lower House of amendments to an Appropriation Bill, and he did not realize the fundamental distinction between the House of Lords and a House in a federation, which, moreover, was practically limited in number though nominee. It was, of course, absurd in the Tasmanian case to rely even in any degree on a Canadian parallel; the Tasmanian Constitution was deliberately created to give power to an Upper House as representing the people by direct vote, and from its creation it had exercised power to amend. The definitive opinion of Mr. Cohen, selected by the Government itself to advise, is worth recording:

I can find no warrant in fact, in law, or in constitutional practice for many of the statements contained in the cables forwarded by the Administrator to the Secretary of State. On the facts, it is important to notice that the amendments proposed by the Legislative Council affected only a comparatively small proportion of the whole Bill. In respect to the balance, the Legislative Council was, I understand, always ready and willing to pass the Bill, and this could, I think, have been readily effected in a constitutional manner and in circumstances which would have obtained supply while at the same time not in any way affecting the privileges, or supposed privileges, of the Assembly.

The legal opinions of lawyers consulted by private organizations, of course, unanimously condemned the action of the Government,¹ but it is well to have on record the fact that no lawyer could be found to accept the legality of the Government's action.² It is, therefore, to be regretted that, as now appears from the Parliamentary Paper, the Secretary of State formally intimated that the two alleged Acts would not be disallowed. It was not to be expected that he would proceed to disallowance, for the validity of the measures could have been tested in the Courts, but it has always been recognized that, where an Act is objectionable but action as regards it is undesirable, it should simply be left to what operation it has. It must, however, be noted that, as appears from the proceedings of the Council on September 13, 1928, although on December 18, 1924, a formal statement of the views of the Council³ was sent to the Administrator for transmission to the Secretary of State, this step was never taken, despite the obvious obligation incumbent on the Administrator. The episode is significant of the difficulty of intelligent control by a central Government when it cannot even rely on the fulfilment of such an obvious duty by the local representative of the Crown. Moreover, it was announced on October 23, 1928, that not only was the docu-

¹ Keith, *Responsible Government in the Dominions* (1927), ii, 1246, 1247.

² It is clear that even the Attorney-General in 1924 would not advise that assent was legal, and that assent should not have been given without such advice.

³ Parl. Paper, No. 45, of 1924; *The Mercury* (Hobart), Oct. 19 and 24, 1928.

ment withheld from the Secretary of State, but that it was never even communicated to the Governor, who remained ignorant of its existence until October 1928.

The Present Compromise.—The ground why a remarkable reticence has hitherto prevailed as to this incident is perhaps due to the fact that the Council was engaged for a considerable period in seeking an accommodation with the Lower House on the basis of a new definition of its powers. The compromise now in force¹ provides that the Council may not amend a Bill for an appropriation Act, or for an income-tax rating or a land-tax rating Act; otherwise it may amend any vote, resolution or Bill, but it may not by such an amendment insert any appropriation clause in a Bill, or impose or increase any burden on the people. An appropriation Bill, however, must deal only with the ordinary annual services and be of no longer duration than a year; an income-tax rating or land-tax rating Bill shall deal merely with fixing the rate of tax for a year; any other provisions in such rating Bills will have no effect, nor will any provision in an appropriation Bill which goes beyond appropriating money for the year be valid. The settlement seems reasonable, but the issue has not been faced as to whether the enactment of these principles has any binding force. The answer seems certainly to be in the negative in view of the Colonial Laws Validity Act, as interpreted by the Privy Council. The most that can be said is that it might well be held that a clause in any Bill contravening the rules laid down might be ruled invalid; but even this is doubtful, and, if the Act specifically included the words "notwithstanding anything contained in the Constitution Act, 1926," there is no doubt that it would be upheld by the Privy Council. It has, indeed, been suggested that such an Act would be invalid unless reserved under the Australian States Constitution Act, 1907, on the ground that that measure requires reservation of any Bill altering the constitution of the Legislature, but a provision as to the contents of an appropriation Bill is not a matter affecting the constitution of the Legislature, unless to that term an unnaturally wide application is given. It is, therefore, clear that the new arrangement is an understanding, which is beyond legal enforcement. No Court would interfere to render it effective, but it may none the less be useful. It is certain that there is no really effective desire in the State to abolish the Upper House or to transform it into a mere replica of the Lower House; the only danger lies in a repetition of the illegal action of 1924-5, when a most dangerous precedent was created.

The Irish Free State and the Privy Council.—It was hardly to be expected that the reference to the Privy Council² as to the meaning of Article X of Articles of Agreement for a Treaty between Great Britain and Ireland under the Judicial Committee Act, 1833, would result in

¹ *Journal of Comparative Legislation*, Third Series, vol. x, pt. ii, pp. 86, 87. Fresh Standing Orders have been duly adopted by the Legislative Council, Parl. Paper, No. 22, of 1926.

² 45 T.L.R. 57.

reversing the judgment in *Wigg and Cochrane v. Attorney-General of the Irish Free State*.¹ The issue involved the interpretation of Article X of the treaty of 1921, which runs: "The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 [*i.e.* the Government of Ireland Act, 1920] to judges, officials, members of police forces and other public servants who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof." This Article was given statutory force by both Imperial and Free State legislation, and this fact placed the cases of officials coming under it in a position absolutely different from that of the ordinary civil servant whose rights to pension are absolutely within the decision of the British Treasury under s. 30 of the Superannuation Act, 1834, which negatives the right to claim a pension or compensation as a matter of law.² The issue, therefore, was in the earlier case whether in awarding pension the Irish Government was entitled to rule (1) that, as regards the portion of the annual pension based on bonus as opposed to salary, the amount should be subject to reduction if the cost of living fell, but not to increase if it rose; and (2) that the lump sum payable should be based on 75 per cent. only of the bonus. It was clear that the calculation made was in accord with the British Treasury rule adopted in a minute of March 20, 1922, but it was denied by the officers that this minute was binding on them, and the Privy Council upheld this contention. Unfortunately the judgment contained an erroneous assumption; it was taken as a fact that the officers had been transferred to the Irish Free State before the minute was issued by the Treasury, but the transfer took place apparently on April 1, 1922, and in any case after the minute. It was on the strength of this error of fact that the reference was made to the Judicial Committee, which, therefore, had as a preliminary to decide whether it could overrule the earlier case. It is satisfactory to find that the Privy Council, without derogating from the fundamental principle of finality, declined to be rendered impotent and to reduce the royal reference to a farce, and that it was able to pronounce a judgment on the merits. No other action could have been expected in view of the precedents.³ It is also satisfactory that the Court did not pronounce on the complex suggestion that the officers, though not transferred to the Irish Free State before March 20, 1922, were transferred before then to a Government of Southern Ireland, though it is clear that it did not much favour this ingenious hypothesis. The issue, therefore, was simply whether the Article was properly interpreted by the Irish Government to include the rule of the Treasury minute of March 20, 1922, and that involved the meaning to be placed on the word "fair," for the rest of the Article does not demand

¹ [1927] A.C. 674; 43 T.L.R. 457.

² *Considine v. McInerney*, [1916] 2 A.C. 162.

³ *Ridsdale v. Clifton*, 2 P.D. 276, 307; *Read v. Bishop of Lincoln*, [1892] A.C. 644.

that the standard of the Act of 1920 should be followed ; it merely makes that standard a minimum. It is not surprising that on the issue as to fairness the Privy Council should have followed the case of *Wigg and Cochrane*. The Treasury minute in its insistence on an over-riding maximum clearly may be justified on grounds of economy, but it can hardly be said to be in accord with natural justice, and the arbitrary fixation of the amount of bonus to be taken into account in determining the lump sums payable is equally open to criticism. In the case of the ordinary civil servant with a career before him the Treasury regulations are doubtless fair enough ; to apply them to the man whose service is cut short by changes made on grounds of high policy is clearly a very different thing. Moreover, it is certainly satisfactory to be relieved of the suspicion that so important a case as that of *Wigg and Cochrane* could have been decided after so much argument merely on a misunderstanding of facts.

The Position of the Free State.—The decision of the Judicial Committee is the more satisfactory because it was delivered despite the strong political reasons which had induced the rehearing, and had created the hope that by its result the possibility of a failure of the Irish Free State to honour the treaty would be avoided. Unhappily that Government on February 22, 1928, announced definitely that it would not accept the decision of the Privy Council in so far as it gave officers who retired better terms than would have been awarded under the Treasury regulations, and that it would legislate to reduce the compensation payable to accord with its own view. Such legislation,¹ it is clear, will be *ultra vires* the Free State, and to validate it an Imperial Act would be requisite, and it is very dubious whether any justification can be adduced for such legislation to deprive men of what the Privy Council has twice formally and emphatically pronounced to be fairly due to them. Nor is it easy to see why the Imperial taxpayers should be made to bear the burden which is incumbent under the treaty on the Irish Free State. Already, of course, enormous concessions have been made to the Free State ; it has been given a boundary which is in excess of its rights as determined under the treaty, and it has been excused its share of the Imperial debt, and it may be hoped that on reflection the Free State may accept the obligation of an honourable carrying out of the terms of Article X according to the meaning assigned to them by Mr. Justice Meredith and by the Privy Council after the most elaborate investigation.

¹ Assuming, of course, that the Governor-General felt able to assent to an Act varying the treaty.

NOTES.

Legal Education.¹—The Faculty of Law of Columbia University, New York, has been engaged for some time in preparing a plan for the complete reform and reorganization of the teaching of law in that great institution. They have called in to their assistance as an outside expert Professor Leon C. Marshall, head of the department of Political Economy in the University of Chicago. In order to have the advantage of French experience, Mr. Marshall has availed himself of the services of M. Robert Valeur, of the Faculté de Droit de Lyon, and the present volume is the fruit of a year's study of the problem of legal education in America as it presents itself to a French observer of special competence. Within the same volume is a separate study by M. Edouard Lambert, to whose untiring energy we are largely indebted for the production of so many works in the field of comparative law. M. Lambert's brilliant essay deals broadly with the same subject, and the two works together compose a most readable and instructive volume.

Many circumstances combine to make the problem of legal education more complicated in the United States than it is in a country such as France or England. The law students of any of the great American Universities, such as Harvard, Yale, Columbia or Chicago, are drawn from all parts of the country, and many of them intend to practise in their own State. Each of the forty-eight States has a law which, owing to its own special statutes and to the decisions of its judges, differs considerably from that of any other State. The Law Reports of all the States and of the Federal Courts together amount now to 12,000 or 13,000 volumes. No law school can attempt to deal with all these diversities. Accordingly some of the principal law schools, and notably Harvard, definitely limit their instruction to those general principles of law which are applied in all the jurisdictions. They aim at being schools of national and not of local law. This has been the policy of Harvard for nearly a century. But this policy exposes such schools to the competition of other institutions which profess to give to the young lawyers of a particular State a training of a more directly practical character. Each State lays down its own conditions of admission to the State Bar, and in most of them all candidates have to pass an examination in law whether they are graduates of a law school or not.

¹ *L'Enseignement du Droit en France et aux États-Unis*, par Robert Valeur, et *L'Enseignement du Droit comme Science Sociale et comme Science Internationale*, par Edouard Lambert. (Paris : Giard. Pp. cxxii + 393. 65 francs.)

Further, the law schools, or at any rate the best of them, have for a generation or more been striving to raise the standard of admission to the school, and in this they have had the support of the more enlightened members of the profession. But they had to contend with an old American tradition that the legal profession ought to be as free and open as possible. And, as each State can fix its own conditions of admission to the Bar, any approach to a uniform standard for the whole country is almost unattainable. In 1927 there were fourteen States in which a candidate for the Bar examination did not require any specific evidence of general education, and nine States in which the candidate was not even required to show that he had studied law during any specified period; while by the Constitution of Indiana "every person of good moral character, being a voter, shall be entitled to admission to practise law in all courts of justice." This is *la carrière ouverte aux talents* with a vengeance. It is safe to say that of the 132,590 lawyers of America, according to the figures of 1920, a large number entered the profession very scantily equipped both as to general education and technical training. It is significant that in 1925-6 the "part-time" law schools which M. Valeur rather maliciously calls "night-schools" had 29,000 students, or just about double the number of those in the "full-time" schools.

The conditions of entrance to the "full-time" schools vary considerably. But five of them now admit only students who have a college degree, and it is likely that others will follow suit. Harvard was in the van, having since 1900 refused to admit any but graduates, a severity which has not checked the growth of the school, for in 1925-6 it had 1,325 students. But desirable as it is to have a high standard of admission to a law school, the plan lately proposed at Columbia inspires misgivings. It is suggested that less weight should be given to diplomas than to "native ability," and, by way of discovering this native ability, it is proposed that candidates should be subjected to three "tests": (1) of intelligence, (2) of aptitude for law, and (3) of strong vocation. The application of these tests is by asking the students a great number of questions, to which he must reply Yes or No or by the signs plus or minus. M. Valeur does not explain the method as fully as might be wished, but from his account of it we do not envy either the candidate or the examiner. We entirely agree with M. Valeur that if we are to have tests of intelligence instead of diplomas, the unfit would be more likely to be eliminated by setting the candidates to write a long essay on some general subject, a fairly stiff piece of Latin prose composition and giving them a well-chosen mathematical problem than by any such mechanical processes as those suggested.

In regard to the method of instruction in the law school it does not appear that the reformers want to alter the case-book system, which in the last generation has carried everything before it in America. Anyone who, like the writer, has attended classes conducted by such masters as Mr. Ames, Mr. Williston or Mr. Beale would be blind indeed if he did not

realize the great merits of this system. The students feel at once that they are dealing with practical affairs ; they learn to stand up and argue legal propositions and become expert at distinguishing awkward cases. They acquire the habit—so essential to the advocate—of preparing themselves with sound or at any rate plausible answers to likely and even unlikely questions. A good student who has had a year or two at this sort of practice under the supervision of a professor who knows his business can hardly fail to have his wits sharpened and his power of reasoning developed. But it does not follow that the case-book system ought to supersede all other modes of legal instruction. For some subjects—for example, Roman Law, History of Law, Jurisprudence, Public International Law—it is obviously unsuited, and for other subjects it may be used to excess. M. Valeur's criticisms of the system are shrewd and pointed, though his is a *vox clamantis*. The champions of the system claim altogether too much for it when they say that it enables the student to work out the problem for himself. If he had merely the facts of the case given him without the judgment of the Court the contention would be more plausible. A student trained by the case-book system only very often cannot see the wood for the trees. He has no grasp of the fundamentals. On the other hand, the young continental lawyer who knows his codes by heart carries in his head a clear scheme of the law as a whole, but his knowledge is apt to be unrelated to facts. The best method would seem to be to combine the case-system with formal lectures, using the cases to illustrate the principles which the student has already learned and employing in addition such exercises as the intensive study of groups of cases on a particular subject, moots and so forth.

Perhaps the most suggestive parts of this book are the discussions both by M. Lambert and M. Valeur of the fundamental question, What is the true aim of a faculty of law ? Is its primary purpose practical or scientific ? Should it aim first and foremost at fitting the young lawyer for his profession or ought it to be primarily a workshop of scientific study and research of which the young lawyer is, so to speak, a by-product ?

The Law Faculty of Columbia have taken their courage in both hands and declared "our major objective should be the study of law as an aspect of social organization," an aim expressed more tersely by Mr. W. W. Cook, "To teach law against its social and economic background."

This is the position of the French faculty of law, but for them it is easy because they have the monopoly of degrees and their *licence en droit* is a *sine qua non* for admission to the Bar. They have no competition to fear. In America the situation is widely different. M. Lambert argues with all his accustomed eloquence that the law is a body of rules which we cannot understand without knowing a great deal about their history and about the economic and social conditions which prevailed at their formation. Nor ought we to neglect the light thrown upon them by the study of other legal systems. And as the law is a product of a parti-

cular state of society, it follows that when that state of society has changed the old law will no longer be suitable. It must be modified to fit the new environment. Herein, according to M. Lambert, lies the danger of the Anglo-American cast-iron rule of binding judicial decisions. We cannot escape from the clutch of the dead hand. In many classes of cases he urges that the judge should be free to lay down the rule which suits the new conditions. True to a great extent as all this is, we doubt very much if the American Courts will be persuaded to give up the rule of *stare decisis*. Nor are we at all sure that if it were changed litigants would not find that they had fallen out of the frying-pan into the fire. Until the Courts are manned by supermen would it be safe to give them such uncontrollable power as this?

It is altogether desirable that such of the American law schools as feel themselves strong enough to do so should offer to their students an opportunity of studying law in the most scientific manner and should aim at producing a class of highly trained and learned lawyers comparable with the *élite* of the continental schools, and it is much to be wished that in years to come such an *élite* should, as M. Valeur suggests, play a great part in American politics. But, to speak plainly, they will have their work cut out for them. We fear that the majority of American law students will find these ideals too lofty. Many of those who attend a law school do not intend to practise. They become business men or politicians. And of those who continue to call themselves lawyers a considerable proportion are business men much more than legal practitioners. There are plenty of "lawyers" who seldom or never enter a Court and hardly open a law book except the statute book.

The young men who contemplate this kind of career will not be lured by the siren songs of M. Valeur, or even by the professors of Columbia. They will seek a law school which will give them what they consider the most practical training.

But in the United States there is plenty of room for various types of law schools and we wish all success to the reformers.

F. P. W.

Labour Legislation.¹—The International Labour Office has recently completed the publication of vol. vi of the annual *Legislative Series*, containing translations of labour legislation from all parts of the world. This volume, which gives legislation of the year 1925 only, is issued in three parts, two devoted to text and the third to indexes. It arrives too late after the year to which it relates for any comments on the trend of legislation shown in the volume to be of interest. Nor can a single year's laws form the basis of any comparative study of the legislation of the different countries. But the *Legislative Series* as a whole, as

¹ *Legislative Series*, vol. vi, 1925: Part I, International and Albania to France; Part II, Great Britain to Zanzibar; Part III, Indexes. International Labour Office, Geneva, 1927 & 1928. (P. S. King & Son. Pp. 649 + 921 + 146.)

it appears year after year, is building up an immense mass of excellently arranged raw material, such as is required for studying the developments of labour legislation in the different countries, and comparing the various methods and systems adopted. The *Legislative Series* is one of the most important publications of the International Labour Office having permanent value. Many of the Office's publications are only compiled for some particular occasion. The *Legislative Series* becomes increasingly valuable as time goes on, and its compilers clearly have this character of permanent utility in mind. They offer lawyers and others interested in industrial legislation every facility for the comparative study of this branch of the law. They present what amounts to an annual bibliography of the subject in the "Chronological Index of Labour Legislation," which covers all the "reasonably important" labour legislation of the year, whether this takes the form of Statutes or of Statutory Orders and Regulations. A vast number of law gazettes or official journals must be searched through for its compilation, and all those who have occasion to use it may well be grateful for the full references given to the official sources where the original texts can be found. Not a quarter of the items in this index can be translated and published textually. As it is, the two parts devoted to selected texts consist of over fifteen hundred pages; the full texts of all the measures mentioned in the Index might well fill five or six thousand. For instance, the Laws and Orders of Great Britain fill over five of the closely printed pages of the Index; but, out of the seventy-five items in the list, only ten are printed in full in the volumes of texts. Those measures of which only titles are given are mostly Orders, such as regulations under the Health Insurance and Pensions Acts, the Unemployment Insurance Act, the Trade Boards Acts. These the International Labour Office could hardly be expected to reproduce in full for the benefit of foreign students, who are provided instead with a full list from which the Orders on any particular subject of study could be procured if desired. Moreover, where the subject of any Law or Order is not apparent from its official title, a brief explanatory note is added. Geographically, the scope of the *Legislative Series* is world-wide. No State is excluded because it is too small or because its legislative jurisdiction is more or less subordinate to that of some central or federal Legislature. It is hard to think of a single country, colony or territory that is not represented in the Index, if not by a full text. The volumes of texts of 1925 run through the alphabet from Albania to Zanzibar. It is, however, only in the Index that we find particulars of the activities of the State Legislatures of the United States of America. This is no hardship for English students, since the U.S. Bureau of Labor Statistics publishes its own periodical compilations of the labour laws of the States.

It must be a matter of no little difficulty to select the laws for publication. No rigid delimitation of labour legislation is possible when the matter is considered internationally. What is clearly labour

law in one country may find its counterpart in another in some measure of social legislation which has no connexion with labour or employment as such. An obvious example of this difficulty can be found in the different methods of providing old age pensions. Fortunately the compilers of the *Legislative Series* attempt no rigid definition. They merely say, in an explanatory note at the head of the Chronological Index, that they include in it only labour legislation "in the narrower sense, excluding laws affecting the working classes in general apart from the question of employment." A glance through the volumes of texts shows how very wide this "narrower sense" is. Amongst the texts of 1925 held important enough for reproduction or translation almost every conceivable branch of labour legislation is represented. There are many measures of industrial hygiene and safety, most of which take the form of regulations for especially risky occupations. There is a great deal about the regulation of hours of work, much of which, again, takes the form of Orders rather than Statutes. We find, for instance, all the administrative Orders of 1925 issued under the French Eight-hour Day Law. These are necessarily given in full, since the whole efficacy of the law depends upon the issue for each trade of an order applying to it the principle laid down by the law, with any exceptions found in practice desirable in that particular trade. It is indeed very largely with exceptions to general statutory rules of hours that most of the countries were in 1925 concerned. The allied subject of holidays also received considerable attention in that year, especially as regards a regular weekly rest-day and occasional whole holidays, and also as regards periods of paid annual leave for workers, on which subject two countries legislated in the year under review. The regulation of hours appears also incidentally in a variety of measures adopted for the special benefit of some particular class of worker, such as women and children, shop assistants, salaried employees, and even seamen. The method of making the employment of salaried, as opposed to wage-earning, workers the subject of special regulation was followed in Bolivia and Chile in comprehensive Acts, dealing with the form, duration and determination of the contracts of such persons, and also with their hours of work, salaries and commissions, sickness benefits and superannuation. The volume contains minimum wage laws from Canada and South Africa, some examples of conciliation and arbitration laws (including the new version of the Canadian Industrial Disputes Investigation Act adopted to overcome the constitutional difficulties encountered by the original Act of 1907), and a Mexican Act purporting to deal with the knotty problem of "liberty to work." There are also in the volume a number of important Ordinances for the protection or control of natives both in mandated and other territories where native labour is employed or recruited, and there is a good deal about compulsory labour, both as affecting natives and for citizens in general (as, in public works of various kinds, in Paraguay and Bulgaria). It

may seem doubtful how far measures imposing compulsory labour service on the citizens of a State are to be classed as labour legislation in its ordinary sense. The original Act establishing the Bulgarian system of compulsory labour service was published in the *Legislative Series* of 1920, and it has been possible to observe the developments of the system from the subsequent Acts and Orders given in later volumes. Immigration laws, too, are on the borderline of labour legislation, but naturally the *Legislative Series* includes measures restricting immigration incidentally by fixing a minimum below which the proportion of nationals employed in certain undertakings may not fall. The present volume gives also a curious Cuban law apparently intended to encourage the immigration of women. This law requires all or a specified proportion of the employees in certain shops and offices to be of the female sex, and expressly restricts the employment of male immigrants in these female preserves. A number of countries were dealing, in 1925, with the unemployment problem either by establishing and regulating employment exchanges or by unemployment insurance. Most of the countries in question were amending or developing existing unemployment insurance laws, while Bulgaria instituted a new scheme of employment exchanges coupled with a system of insurance. Other branches of social insurance (insurance against sickness and disablement, and pensions for widows, orphans or the aged) also figure amongst the enactments of 1925, and there are a very large number of measures concerned with workmen's compensation and accident insurance.

The only criticism one feels inclined to make of this carefully compiled and well-printed *Legislative Series* is that it appears so late. Is it unreasonable to inquire why the International Labour Office does not supply us, at the beginning of 1929, with the laws of 1927 instead of those of 1925?

S. S.

Civil Code of Brazil.¹—Brazil became independent in 1822. By a decree passed in the following year it was ordained that all laws and ordinances of the Kingdom of Portugal promulgated up to April 25, 1821, should continue in force; and at the same time it was announced that a Code would be promulgated in due course. No step was, however, taken towards the fulfilment of this promise until the year 1859; but from that date onwards the jurists and the successive governments of Brazil were continuously occupied for nearly sixty years with the task of elaborating a national Civil Code. Their labours culminated in the promulgation, on January 1, 1916, of the text, the French translation of which, prepared under the auspices of the *Société de Législation Comparée* and admirably produced by the Imprimerie Nationale, is now before us.

As the most recent specimen of codification (excepting the Turkish

¹ *Code Civil des États-Unis du Brésil*; Loi No. 3,071 du 1^{er} Janvier, 1916; traduit et annoté par MM. Goulé, Daguin et de Tizac. (Paris: Imprimerie Nationale.)

adaptation of the Swiss Code), and as the product of the best legal minds of a great country, writing, as it would seem, in an atmosphere of considerable intellectual liberty, this work presents many features of interest, of which it is only possible to touch on a few. In its general character the new Code is undoubtedly French, but shows, as might be expected, unmistakable traces of the influence of the German Code. It is distinctly the shortest of any of the other principal Civil Codes of the world, having only 1,807 articles, as compared, for example, with the 2,281 articles of the French Code, the 2,385 articles of the German, and the 4,051 of the Argentine Code.

Among novel, or comparatively novel, topics selected for specific treatment may be mentioned *biens de famille* (homesteads), the hypothecation of railways, the contract of publication, the contract of dramatic representation, the contract of insurance, and obligations created by unilateral declaration (bearer documents and promises of reward). The following doctrines are worthy of note. While the relative incapacity of the married woman is preserved, it is extended to the married man, who cannot alienate even his own immoveables, or sue or accept suit in regard thereto, or become a surety, or make a gift of the common property, without his wife's consent. The rule *promesse de vente vaut vente* does not apply: rights in immoveables are conveyed by the formality of registration and by that alone; and in moveables only by tradition. The law of contract is enfranchised from the doctrine of *cause*. On the negative side it is noticeable that tort, *stipulation pour autrui*, and quasi-contract are treated in less detail than has lately become fashionable.

M. S. A.

Léon Duguit.—The death on December 19, 1928, of Professor Léon Duguit of Bordeaux removes from the scene one of the most brilliant and, at the same time, most provocative of French legal writers.

The volume of his published work is astonishing, and whatever he wrote was in style vigorous and effective. His main work is his *Traité de Droit constitutionnel*, of which the last edition of 1926 is in five volumes and incorporates the book previously entitled *L'État*. A third edition of the first volume only was issued in 1927 containing *La Règle de Droit* and *Le Problème de l'État*. It gives the kernel of Duguit's teaching.

Among his smaller works are *Le Droit Social*, the companion volumes, *Les Transformations du Droit Privé* and *Les Transformations du Droit Public*, and his *Leçons de Droit Public*, which were delivered originally before the Egyptian University.

Among his other activities he was latterly the Director of the *Revue Internationale de la Théorie du Droit*.

Duguit's main philosophical doctrines, to which in all his writings he is ever returning, are that the individual as such has no rights and that the fiction of the personality of the State ought to be abandoned. The

State is merely a society consisting partly of those who govern and partly of those who are governed, and the only title of the governors to govern is that they have got *de facto* control of the machine.

He accepts with enthusiasm the doctrine of Auguste Comte: "The word *right* deserves to be banished from political terminology as much as the word *cause* from philosophical terminology. Of these two theologico-metaphysical concepts, that of *right* must henceforth be considered immoral and anarchical, that of *cause* irrational and sophistic. . . . *Right* has no true meaning unless it emanates from a superhuman will. . . . In the State of the actual world, which recognizes no celestial prerogative, the idea of right disappears for ever. Every man has duties towards every other man, but no man has any rights properly so called. . . . In other words, the only right which any man can possess is the right always to do his duty." (*Système de Politique Positive*, i. 361.)

This was the corner-stone of Duguit's edifice.

Every man belongs to a particular social group, and from that very fact he owes duties to all other members of the group. This is his famous *règle de droit* which all members of the group, great or small, governors or governed, are bound to obey. The fundamental rule of society is social interdependence.

And the laws made by the *de facto* governors having no halo of sovereignty about them are to be obeyed, not because they emanate from a sovereign, for sovereignty has vanished, but only because they conform to the *règle de droit*. There is no obligation to obey a law which does not so conform, though he admits that the right to refuse obedience is *dépourvu d'efficacité*. One cannot be surprised that these theories have provoked strong opposition. Eminent writers, such as Hauriou, Michoud and Esmein, have stigmatized them as anarchical—*chimère anarchiste*.

And the work of M. Bonnetcase—a colleague of Duguit's at Bordeaux—which is reviewed in another column, is largely devoted to a criticism of the doctrines of Duguit. But, however open he may be to attack in regard to certain fundamental doctrines, no one will deny that his work as a whole is in a high degree valuable and stimulating.

Duguit declared "Il faut affirmer énergiquement et inlassablement." And he practised what he preached.

F. P. W.

Law Reform.—In England, proposals for legal reform on a large scale meet, as a rule, with little response.

In his short series of articles in the *Nation* on September 15, 22 and 29, 1928, Sir Maurice Amos put the case strongly.

There is no doubt that the complexity and cumbrousness of our law make it unsuitable for export, and that the spread of French influence abroad has been due in no small degree to the Code Napoléon, which has the great merit of seeming to be comprehensible.

As Sir Maurice Amos says, no foreign country has ever adopted our laws, whereas French, German and Swiss laws have been copied, or bolted wholesale in many countries, the latest example being that of Turkey. If China should borrow the German codes or a great part of them, who can doubt that this will be an advantage to German traders?

It is true that our colonists carried the common law in their scanty baggage when they went to the New World, and mighty unsuitable it was for primitive conditions. In the early days they managed to live on very little of it.

Before any such wholesale recasting of our laws as Sir Maurice Amos proposes can be thought of, public interest will need to be roused, and of that we see at present little sign. It is from the legal profession itself that the impulse would need to come.

But, apart from such radical reforms, could there not be provision made for securing amendments of detail? Every practising lawyer comes up now and then against minor anomalies and *lacunae* in the law which could be set right by a short enactment. As things are, he only shrugs his shoulders; there is no one to whom it is worth while suggesting the amendment.

We might reply to Cicero's ghost whom (or should it be which?) Sir Maurice Amos conjures, that the legal profession is not very likely to be "vigilant and fresh-minded in the searching out of defects," when it knows very well that nothing is going to be done about it. F. P. W.

NOTICES OF BOOKS.

THE BRITISH EMPIRE.

THE international position of the British Dominions has naturally evoked an interesting mass of continental literature, of which much, it may be admitted, suffers from an imperfect appreciation of the Constitution of the Empire. Dr. E. E. Buchet in his recent study ¹ has avoided many of the errors of his predecessors in this field by insisting at the outset on the distinction between legal law and constitutional law; the terminology is undoubtedly awkward, but it serves to emphasize a distinction of essential importance, but one often imperfectly realized by foreign critics. By the use of this distinction he is able to reach the conclusion (p. 126): "Si la Grande-Bretagne a conservé intacts ses *legal laws* théoriques, en *constitutional law*, elle ne possède plus la souveraineté absolue. L'empire britannique continue pourtant à être considéré dans la pratique internationale un État souverain." So sound a conclusion, which the author reaches after rejecting efforts to classify the Empire as a personal or real union, a federation or a confederation, proves the care with which the author has studied his subject in its fundamental aspects. He is tempted indeed to recognize in the Dominions a right to make war and peace separately but abandons this theory, and he is clear that the Dominions have no legal right of secession, though erroneously he ascribes a belief in this right to General Smuts. It is more difficult to accept the view (p. 120) that the responsibility for failure of a Dominion to implement any treaty affecting it directly, and concluded by the King in its name, rests solely on the Dominion. Pressed to the logical conclusion, this implies a breaking up of Imperial cohesion which is as yet unthinkable; primary responsibility, of course, rests on the Dominion, but this has long been the case, as in the classical example of German tariff retaliation against Canada for the British preference. The Empire, in fact, does not lend itself to any simple exposition, for it is a unity *sui generis*. Unluckily, the merit of the thesis is diminished by a remarkable number of errors of fact; Mr. Joseph Chamberlain did not live to propose confederation in 1917, and Sir J. Ward's proposal of 1911 (not 1921) was for a true federal system, not for a confederation. Nor was the control of the Dominion forces by the Imperial Government during the war carried out by reason of the supremacy of the Army Act (p. 38); it was the direct result of the decision of the Dominion Governments to place their troops under Imperial authority.

¹ Le "*Status*" des Dominions britanniques en droit constitutionnel et en droit international. (Paris: Recueil Sirey, 1928. Pp. 139.)

While Dr. Buchet is concerned with the fundamental question of status, Dr. L. L. M. Minty¹ is concerned with aiding students in dealing with constitutional questions regarding the Empire in LL.B. and Bar examinations. The issues of international status are, therefore, almost entirely ignored, nor is what is said (*e.g.* p. 98) wholly accurate. The work, however, seems adapted to its purpose, though there are certain errors which may mislead. Thus it is laid down (p. 61) that "until a colony has been granted a measure of self-government, it may be administered by Orders in Council, and provided such Orders in Council do not conflict with Acts of the Imperial Parliament, they are as valid as laws." This ignores entirely the fundamental rule that in a settled colony the Crown cannot make laws by Orders in Council save under statutory authority, a fact which explains the genesis of the British Settlements Act, 1887, and its forerunners, whose origin is clearly overlooked (p. 57). Nor of course is Swaziland annexed to the British Crown as apparently held (p. 6); the decision in *Sobhuza II v. Miller*² is entirely one on the exercise of authority under the Foreign Jurisdiction Act, 1890. Nor is it the case that in a colony when the Crown grants a Constitution it cannot recall it (p. 8). This is true only of the grant of a representative Constitution, without the reservation of power to revoke, and the Crown has the same right to alter or revoke Constitutions under the British Settlements Act as it has under the Foreign Jurisdiction Act. The case of *Sprigg v. Sigcau* (pp. 62, 63) really illustrates no principle; what was there held was simply that the actual terms of a Cape of Good Hope Act of 1894 did not authorize the Governor to exercise legislative power save to a limited extent, which he had overstepped, and in 1897 the necessary powers were bestowed on the Governor by the Cape Legislature with the approval of the Imperial Government and without question in law.³ The account of *Buron v. Denman* (p. 124) will certainly mislead; it cannot be too clearly impressed on the student that the defence of "act of State" is one of the most limited kind and that the essential questions to be considered are whether the action impugned was committed in British or on foreign territory, and whether against a British subject or an alien.⁴ The Treaty of Lausanne was not signed in the summer of 1924 (p. 14), and the Imperial Parliament can hardly be styled the English Parliament.

A very different aspect of the responsibilities of the Empire is dealt with by Dr. Stoyanovsky,⁵ who is already known as the writer of an interesting and meritorious treatise on the principles of the mandatory system. He describes in full detail the application of that system to

¹ *Constitutional Laws of the British Empire*. (London: Sweet & Maxwell, 1928. Pp. xvii + 258. Price 15s.)

² [1926] A.C. 518; *Journal of Comparative Legislation*, Third Series, vol. viii, pt. iv, pp. 288, 289.

³ Keith, *Responsible Government in the Dominions* (1912), iii, 1622.

⁴ Dicey, *Conflict of Laws* (ed. Keith, 1927), p. 227.

⁵ *The Mandate for Palestine*. (London: Longmans, 1928. Pp. xv + 399. Price 25s.)

Palestine. Dr. Stoyanovsky makes a valiant effort to explain that there is no inconsistency between Article XXII of the League Covenant and the régime adopted for Palestine (pp. 42-7), but it is difficult to feel that his effort has cogency. The case was best put, in point of fact, by Sir William Finlay in 1921, when he said¹: "Palestine does not really fall within any of the three categories laid down in Article XXII, and the validity of this mandate depends upon Article 95 of the Treaty of Sèvres, which applies to the special case of Palestine the provisions of Article XXII." That Article of the Treaty of Sèvres definitely imposed on the mandatory the duty of carrying out the British declaration of November 2, 1917, as to the establishment in Palestine of a national home for the Jews, but, as the Treaty of Sèvres never was ratified, the argument based on it is worthless. Moreover, Dr. Stoyanovsky himself admits that the first part of Sir W. Finlay's doctrine may be questioned on various grounds, and in point of fact it is clearly untenable. The obvious fact is that Article XXII of the Covenant should not have been accepted in its present form in view of the British declaration of November 2, 1917, and it is better to confess that a blunder was made than to seek to prove a consistency which does not exist. Whether the policy of the declaration of 1917 was justified from a moral point of view is an issue on which opinions will doubtless always differ. What is clearly shown by the author is that the result of combining the normal duties of a class "A" mandate with the obligation to establish a Jewish home has imposed on the British administration duties of the utmost complexity, which it has endeavoured with great honesty and care to perform; the vehement protests of both Moslems and Jews regarding its attitude in the "Weeping Wall" incident afford presumptive proof that it has in this, as in other matters, striven hard to maintain an equal justice. Attention may be called to the author's treatment of the *Mavromattis Concessions Case* which has so often troubled the Permanent Court of International Justice (pp. 135 ff., 326 ff.); the jurisprudence of the Court in that instance is interesting but hardly enlightening. Dr. Stoyanovsky is inclined to doubt (p. 242) the criticism of Mr. Wright² that the decision of the Privy Council in *Jerusalem-Jaffa Governor v. Suleiman Murra*³ leaves the administration with a very free hand to interpret the terms of the mandate, but, while one may justly trust the administration to act impartially in the matter, having regard to the known character of those entrusted with high office, there can be little doubt that the Privy Council decision does give the administration much the same width of authority as is possessed in protectorates by the local administrations.⁴ In both cases British jurisprudence hesitates to allow the Courts to intervene in the discretion of Governments, and it is possible that this is the wisest course.

A. BERRIEDALE KEITH.

¹ *League of Nations Official Journal*, 1921, p. 443.

² *American Journal of International Law*, xx (1926), 770.

³ [1926] A.C. 321.

⁴ Keith, *Journal of Comparative Legislation*, Third Series, vol. viii, pt. iv, pp. 289, 290.

THE LAW OF NATIONS.¹

To say that a book of not much more than two hundred pages upon the international law of peace was original would be to condemn it. But Professor Brierly's little book has certain other attractive qualities. It has an individuality of its own, and is not simply the "potted" essence of larger books. The author does not attempt to say something on everything, but has merely selected the topics worth treating and said upon them what seemed to him most worth saying. In our opinion the main characteristic of the book is its freshness of outlook, its "postwar"-ness for want of a better word. It is clearly the product of a mind which has formed most of its impressions upon the subject since the Great War and can thus give adequate prominence to the topics which now matter and are now developing, and to the problems which are now exercising international lawyers, instead of merely squeezing them awkwardly into an old pre-war framework. For example, attention is drawn to the importance of realizing the fact of the exclusion from customary international law of "practically the whole sphere of international economic relations," and the necessity of the gradual encroachment of law upon these "matters of domestic jurisdiction"—facts which were improperly recognized twenty years ago. Again, the whole question of the obligatory force of treaties and of the necessity of finding some better test for determining their obsolescence than the capricious and high-handed application of the doctrine of the *clausula rebus sic stantibus* is tackled with marked lucidity.

The first chapter, on the "Origin and Character of International Law," contains an excellent analysis of the distinctive contributions of the leading classical writers to the subject and an estimate of the claim of international law to rank as law, and no one will grudge the forty-five pages consumed by it. A topic to which the teacher hardly dares to introduce the elementary student—what is called, unfortunately in Professor Brierly's opinion, State Succession—is successfully outlined under the title of "Continuity and Termination of the Existence of a State" and illustrated by means of a number of recent judicial and arbitral decisions. Equally refreshing is the treatment of the alleged "right of self-preservation" in whose name so many crimes of force and diplomacy have been committed. Again, the question of the limits of criminal jurisdiction and the conflict of opinion illustrated by the *Lotus* case receive adequate treatment.

Twenty pages upon "Disputes between States" comprise a useful summary of the various methods, new and old, of solving disputes by means other than war. One portion of this chapter, section 3 upon "The Limits of Arbitration as a Method of Settlement," is probably the only part of the book which could be called controversial. The author does

¹ *The Law of Nations: An Introduction to the International Law of Peace.* By J. L. Brierly. Oxford: Clarendon Press. 1928. Pp. viii + 228. Price 5s.

not hesitate to express his own views upon the attempt now being made in certain quarters to bring the whole range of international disputes within the scope of law by means of a régime of compulsory arbitration. "Until the society of States is willing to give a larger place to law in its relations than hitherto, we ought not to expect too much from the judicial method" (p. 190).

A final chapter upon International Organization contains a summary of the new phase of international co-operation which is developing through the agency of the League and the International Labour Office.

If the layman can be induced to read this book the popular notion of international law as a futile body of rules mainly occupied with poisoned bullets and gas warfare, blockades and prisoners of war, ambassadorial privileges and maritime salutes, will change, and its true position in the development of international society will be realized. The other portion of the author's public—the law student—has, in our experience, already hailed the book with acclamation, which will not surprise any reader who remembers the students' books which were available to a beginner in the subject twenty years ago. This book is now without question the first book which the British student must read.

We have no patience with those who clamour for a "new international law" beginning in 1919 and regard everything that was written before 1914 as the "bad old law." But one cannot read this book without realizing the truth that there comes a time in the history of a living subject such as international law when the new material can no longer be poured into the old vessel. That method leads to wrong proportions and to wrong emphasis. The great merit of this book, short as it is, is that without being heterodox it brings a modern point of view to bear upon a rapidly developing body of material. A comprehensive treatise written in this spirit would effectively render obsolete most of the pre-war textbooks, and the author is clearly the man to write it.

ARNOLD D. MCNAIR.

INTERNATIONAL LAW.¹

PROFESSOR MCNAIR's edition of the second volume of this well-known treatise (reviewed in a previous number of this *Journal*) is now followed, two years later, by a new edition of volume one by the same distinguished editor. With its publication we now have a substantially enlarged and up-to-date edition of back volumes of Oppenheim's monumental work. The present volume deals with the international law of peace. During the eight years that have elapsed since the publication of the third edition, edited by Mr. Roxburgh, there have been important developments in the conventional law of nations, due in large part to the activities of the

¹ *International Law: A Treatise*. By L. Oppenheim. Vol. i, Peace. Fourth edition, edited by Arnold D. McNair, C.B.E., LL.D. (Longmans, Green & Co., London, New York and Toronto. 1928. Pp. 1 + 827. Price 42s. net.)

League of Nations which was just beginning its career at the time of the publication of the third edition. These developments have necessitated considerable revision of and extensive additions to the text of the older edition.

Professor McNair's task has been twofold. In the first place, he has supplemented the text by the addition of much new matter dealing with the law that may be said to have come into existence since the publication of the third edition ; and, in the second place, he has enlarged and brought up to date the bibliographical apparatus which was one of the distinctive features of Oppenheim's work. The new matter includes a valuable and extensive commentary on the Covenant of the League of Nations and wholly or largely new sections on a large number of other subjects which were not treated at all or insufficiently treated in the earlier editions. Altogether the additional matter aggregates not less than 35 pages, the present volume having grown from one of 842 pages to one of 877 pages. As to the thorough and conscientious manner in which Professor McNair has performed what must have been a difficult task there can be no dissent. Every page which he has touched bears evidence of wide learning, extensive research and painstaking carefulness. His familiarity with the extensive new literature and jurisprudence cannot fail to impress everyone who examines the pages of text and footnotes which he has contributed to the volume. Nearly every statement of fact or principle is fortified by citations of authorities, either text writers or decisions of national or international tribunals, frequently not less than a dozen and sometimes many more. Nothing that has been said by a reputable writer or decided by a tribunal seems to have escaped his notice. Students who may wish to pursue farther their investigation of questions discussed by him, of necessity often briefly, will find his extensive footnotes and elaborate bibliographical references one of the most valuable features of the new edition.

Throughout, the editor has very properly allowed Oppenheim's opinions to stand untouched, although where the changes of juristic opinion and the developments of the law have been such that Oppenheim himself, were he alive to-day, would probably adopt a different view, attention is called to these developments and their discordance with the opinions expressed by the author. As in the earlier editions, there is usually no indication in the text as to what was Oppenheim's contribution and what the two successive editors', although the preface contains a list of the new sections contributed by the editor or revised by him. The reader, therefore, who might wish to ascertain the authorship of a particular statement would be under the necessity of comparing the several editions, a more or less difficult and time-consuming task. But since the desire or necessity for identifying the particular author of a given statement or opinion is likely to be rare the policy of the editors of refraining from indicating by brackets or otherwise their own particular contributions is practically unobjectionable.

The opinions and conclusions of the editor on the multitude of questions discussed by him appear to the writer of this review to be uniformly sound and justified by practice, jurisprudence or the preponderance of the best juristic thought, although naturally on controverted questions dissent may be expected.

The limitations of space prevent a more detailed analysis and evaluation of the new edition of what in certain respects, at least, is the outstanding treatise on international law published in the English language. Its scientific value and practical utility have been very greatly enhanced by Professor McNair's contribution and students of international law everywhere, not to mention practitioners and others concerned with questions of its practical application, will be indebted to him for the notable service he has rendered.

JAMES W. GARNER.

CASES ON THE SALE OF GOODS.¹

THIS collection of cases is of more than ordinary interest. It is not entirely on the American model, as it refers freely in the notes to the leading text-books, such as Benjamin on Sales, Williston on Sales and Chalmers on the Sale of Goods, and also to the legal historians. Adherents of the doctrine of the pure case-book will consider this as a sad lapse from orthodoxy.

The English cases, as is natural, greatly outnumber the Canadian, and of the whole number the greater part are later than 1900. In the Canadian law schools (outside the Province of Quebec) an attempt is being made to find a compromise between the case-book system and the system of professorial lectures. This seems to me to be on the right lines.

As I have endeavoured to show elsewhere, there is no reason why "Latin" countries should not likewise profit by the case-book system without adopting it as the sole method of instruction, or regarding it with superstitious reverence. The publication of the *Espèces Choiesies* in France and of a case-book in Holland are signs of the times.²

ED. LAMBERT.

BOOK OF ENGLISH LAW.³

It was, if I may be allowed to say so, a happy thought on the part of the Editor to allow a continental lawyer to review the new book by Dr. Jenks. It is an honour which I highly appreciate and at the same time a great pleasure. On the continent for many years we have been waiting

¹ *A Selection of Cases on the Sale of Goods.* By J. D. Falconbridge. (Toronto: Canada Law Book Co., Ltd. Pp. xiii + 688. Price \$7.)

² *Espèces Choiesies empruntées à la jurisprudence sous la direction de Henri Capitant*, 2nd ed., Dalloz, 1927; *Arresten over Burgerlijk Recht*, de H. R. Hoeting, 3rd ed., Haarlem.

³ *The Book of English Law.* By Edward Jenks, D.C.L. (London: John Murray. Pp. 460. Price 12s.)

for such a book which should give in clear and concise form a description of the English law as a whole, explaining both its positive principles and the method of their evolution.

At the beginning of the nineteenth century the masterly synthesis of Blackstone had become known in France through translations, though these were, to be sure, of mediocre quality. Jurists such as Toullier were thus enabled to obtain a general knowledge of the law in force across the Channel. Unfortunately, the successive recastings of the work of Blackstone by his successors, notably Stephen, by which the plan and the original text of Blackstone were so much modified, did not find any French translator. Moreover, the intense legislative movement, which began with the reign of Queen Victoria, and the reforms introduced by the Judicature Acts, together with the changed relations between law and equity, were calculated to disconcert and even to discourage the continental lawyer accustomed by his education and profession to the simplicity of the codified laws of Latin countries.

It is one of the chief titles—though not the only one—of Dr. Jenks that he has felt the need of scientific works which should enable a foreign student to get a view of the legal system and the general principles of English law. I have already had the opportunity in this *Journal* and elsewhere to praise the *Short History of English Law* and the *Digest of English Civil Law*.¹ *The Book of English Law* completes the series. It ought to find a place in all law libraries, public and private, of the continent of Europe and of other parts of the world. As a matter of fact, the matter contained in *The Book of English Law* was not primarily intended for a foreign public. On the contrary, it formed the subject of lectures given at the London School of Economics as part of a course of instruction under the general title of "Elements of English Law," by Dr. Jenks, as the holder of a new Chair of English Law in the University of London.

In his preface the learned author indicates in these terms the public to which his work is addressed. "These lectures and discussions were to be for the benefit, not, in the main, of professional lawyers, actual or potential, but of laymen interested in the place of law in modern communities and its influence on economic and social polity." He is too modest to mention what we take the liberty of stating that the course obtained a great success. It is, therefore, to the appreciation of the London public for this kind of instruction that foreign lawyers are indebted for a book which will be of so much service to them. The author is careful to put his readers on their guard against a possible misapprehension. The work is not to be considered as falling into the category of manuals of *droit usuel*. It is not in the least intended "to enable a layman to do his own legal business without the help of professional lawyers." Its objective is best given in the author's own words: "The

¹ *Bulletin de la Société de Législation Comparée*, 1919, pp. 65, 92, 97; *Journal of Comparative Legislation*, Third Series, vol. iv, pp. 269-71.

aim of this book is entirely different, and much more ambitious. It is to make the lay reader, English and foreign, understand that the rules of English law are at once the unconscious expression of the national mind and that, at the same time, they exercise a powerful influence on the mental attitude, and therefore on the character and conduct, of the Englishman." Accordingly *The Book of English Law* is not specifically a law-book. It is a book of social philosophy appropriate to the place where the lectures were delivered upon which it is based. This being its principal aim, it was not necessary to accompany the exposition with a complete system of footnotes or bibliographical references, but a very judicious selection of the chief works to be consulted is given at the end.

In order to carry out successfully the task so courageously undertaken, Dr. Jenks has followed two guiding rules, and it is these which form the most original feature of this book.

He has described the English law arranged in a new scheme which differs notably from that of Blackstone or of his successors. This scheme, he tells us, was drawn up for him by Lord Atkin and Sir William Beveridge together. He divides the subject into five parts: (1) Preliminary, covering the definitions, principal classifications, historical origins and formal sources of English law. (2) The machinery of English law, Courts of Justice, the legal profession, administration of justice, evidence and legal persons. (3) The State and justice, fundamental principles of constitutional law, the Crown and its subjects, duties of the subject, rights of the subject. (4) Criminal law; and (5) Civil law, divided into family law, law of property, trusts, contracts and torts.

He has observed what he calls "one golden maxim"—namely, to emphasize the rules rather than the exceptions. Before the middle of the nineteenth century English law books were veritably *libri exceptionum*. Pollock, Anson, Dicey and Maitland in their textbooks broke with this tradition and Dr. Jenks treads in their footsteps. He has written a scientific work, for, as our philosophers put it, "*il n'est de science que de général.*" There are many details in the book which I should like to praise if space permitted. Every reader will have pleasure in discovering its merits. I can only recommend warmly this excellent and clear presentation. It has fully attained its object, which was to justify and even to exalt the fame of one of the Englishman's greatest achievements, viz. the creation of the one great system of indigenous national law which the modern world has produced.

H. LÉVY-ULLMANN.

PARLIAMENT AND THE JUDICIARY IN ENGLAND.¹

It has been a misfortune for the world that so many countries have adopted parliamentary institutions, without thinking it necessary to study the traditions of law and practice which govern those institutions

¹ *Die Beziehungen zwischen dem Parlament und den Gerichten in England*, Heinrich B. Gerland. (Berlin and Leipzig: de Gruyter & Co.)

in the country of their birth. In the present monograph Professor Gerland seeks to warn his countrymen against this error:

Die englische Auffassung vom Wesen, den Methoden und der damit verbundenen Beschränkung des Parlamentarismus sollte bei uns eingehender studiert werden!

Germans have rightly apprehended that parliamentary government implies the investiture of Parliament with the supreme authority in the State. But they have yet to learn that for the Parliament properly to discharge its sovereign responsibilities, nothing is more important than for it to govern itself, and to exercise its power with tact, moderation and a due sense of the responsibilities and dignity of other bodies in the State. To quote Mr. Cardwell:

The powers of this House are without limit; but they are limited by our own sense of discretion, and guided by the precedents of former generations.

Professor Gerland's present discussion is not, however, mainly directed to the general topic of the self-imposed restraints upon the sovereignty of Parliament, but to the particular subject of the rules and usages which in England prevent the usurpation by Parliament of the specific functions of the judiciary. It appears that this subject has acquired a topical interest at the present day in Germany, as a consequence of the development of a tendency on the part of the Reichstag to set up committees of inquiry to investigate matters which are already and concurrently *sub judice*. The dangers of such a practice, as tending to undermine the authority of the Courts, are evident. In expounding the English practice Professor Gerland first explains the rules of law and practice governing the general topic of the independence of the judiciary. He then describes the various methods recognized in this country for the conduct of public investigations, distinguishing between Government inquiries (Royal Commissions and Departmental Committees) on the one hand, and Parliamentary inquiries on the other. He then expounds in some detail, first the wide powers with which Parliamentary Committees are invested and the quasi-judicial sanctity with which they are surrounded; then, the usages which limit their field of inquiry and prevent their trespassing upon the domain properly reserved to the Courts. He concludes from his investigation that in any case of question, the claims of judicial justice are always preferred; and he comments that "*der Gedanke der Suprematie des Rechtes, den wir früher als eine der Grundideen des englischen Rechtes kennengelernt haben, setzt sich auch hier durch.*"

While emphasizing the great and growing importance of public inquiries as an instrument for the education of opinion and the solution of the problems of government, the writer expresses the interesting opinion that the tendency in England is away from the purely parliamentary inquiry, and towards the neutral inquiry instituted on parliamentary initiative. Of this the Savidge inquiry, conducted under the provisions of the Tribunals of Inquiry (Evidence) Act, 1921, is the most recent example. Professor Gerland's monograph is packed with valuable material, and it may be hoped that it will find a translator.

M. S. AMOS.

BUREAUCRACY.

THE word "bureaucracy" has an import sinister and provocative. It suggests to us liberty dethroned, the law-courts excluded, excessive legislation obscurely framed by non-elected persons, blunders by jacks-in-office claiming infallibility and incapable of apology. Is this our fate? Has Parliament abandoned the country to a tyrannical civil service? Are the judges powerless to protect us from a system of administrative law which Dicey so long refused to recognize? Here are two admirable books which will help to solve these speculations.

Professor Freund, an acknowledged master of legal analysis, makes in his *Administrative Powers over Persons and Property*¹ a comparative survey of governmental organization and regulative legislation in America, England and Germany. He has explored with remarkable thoroughness the operation of statutes through powers, the relative use of licences and orders, and the possibilities of discretionary and non-discretionary action. Naturally we turn to his conclusions about England. He finds in our country a dislike of officialism greater than in America and far greater than on the Continent of Europe. He notes the long absence of a prefectoral system of local government: in place of it he sees our judicially organized county magistrates issuing orders in the form of convictions, undertaking the promotion of public welfare through penal statutes, and acting under the supervision of the King's Courts. At this stage—as Maitland pointed out forty years ago in *The Shallows and Silences of Real Life*—there was no justification for the political theory of the complete divorce of administration from judicature. Professor Freund shows how at length the pressure of urgent social problems caused a change. The reform of the poor law and the growth of public health and factory and workshop legislation led to the creation of central government departments. Legislative regulation was justified because there are public interests which cannot be left to private vindication. Professor Freund does not deny advantages to administrative, as contrasted with legislative, power. Administrative power, he says, is less diffused in point of numbers than legislative power vested in large bodies; it is exercised under a greater sense of responsibility and probably with greater sympathy. To treat alleged abuses as mere varieties of crime may sometimes be futile; the imperative voice of authority is not always appropriate. The modern State may be glad of some less direct form of official action, part service and part control, part suasion and part command, part formal and part informal. He is here not writing of England only, but England cannot afford to neglect his observations and conclusions.

Mr. W. A. Robson's *Justice and Administrative Law*² studies English

¹ By Prof. Ernst Freund. (University of Chicago Press. Pp. xxi + 620. Price \$5.)

² By Wm. A. Robson, Ph.D. (London: Macmillan. Pp. xviii + 346. Price 12s. 6d.)

institutions by themselves without the comparative method. It is a thoughtful and stimulating book, wholly delightful to read. Its object is to examine the judicial functions now exercised by government departments and other public and private bodies. Facing an ever-expanding system of administrative tribunals, Mr. Robson asks himself why they were set up, what services they were thought capable of rendering beyond the frontiers of the law-courts, how far their work is satisfactory and how far their members possess or can acquire that complex of mental habits which we call the judicial mind. The field of inquiry is wide and the boundary between judicial and non-judicial proceedings is not easily drawn. Laymen sit in the law-courts as assessors; judges are often lent to lay tribunals. Mr. Robson would leave disputes between subject and subject to be dealt with by the ordinary legal process, but he thinks administrative tribunals may appropriately decide matters where the State intervenes to provide a service or by way of regulation. Law-courts can decide the question what is a nuisance, for the standard is capable of definite judicial application; they cannot so well answer whether a working-class dwelling is "reasonably fit for human habitation"; they are not suited for promoting a considered policy of social betterment or for creating a new standard. Administrative tribunals may be swifter and cheaper, but Mr. Robson will not allow this advantage to justify in itself the superseding of the law-courts: rather he would see the judicial procedure accelerated and cheapened. He has some valuable suggestions for improving the administrative tribunals. Let us think, for instance, of a borough boundaries extension inquiry. A ministerial inspector hears evidence tendered by parties who may be ignorant of ministerial policy and intentions; he reports privately to his department; the report is considered in private and a decision is subsequently promulgated without any statement of reasons. Mr. Robson reasonably urges that the persons who investigate the facts should decide the issue; there should be no vague pooling of the judicial functions out of sight. A public hearing, oral evidence, knowledge of the probable principles of decision, a statement of the reasons for decision, an accessible series of reported cases—these are advantages of judicial procedure which are not secured by all administrative tribunals. For staffing the tribunals Mr. Robson looks to a blend of specialists and lawyers; the latter are to be men well grounded in law and the social sciences, caught young but not before they have practised a year or two at the Bar. If the subject-matter of the dispute is important, he would allow a right of appeal to a superior Administrative Appeal Tribunal whose decision should be final.

As for domestic tribunals (such as the Inns of Court, the Law Society or the General Medical Council, possessing their own jurisdiction over professional conduct), Mr. Robson would put them all definitely under the control of the law-courts. At present the law-courts merely see that the forms of natural justice have been observed; they do not regard

the substance of the decision. The judges themselves have repeatedly declined to give a rehearing upon the facts to persons dissatisfied by the rulings of domestic tribunals. Frequent and serious injustice, Mr. Robson declares, arises in consequence. Many, however, would regret the change he proposes. Often assisted informally by legal advice, the domestic tribunal cultivates the judicial mind and sees fair play the more anxiously because its decision is final. The jurisdiction of voluntary groups in these matters is an English tradition. The individual is judged by persons of his own sort, whose authority he has willingly accepted. Here, at any rate, the exclusion of the law-courts is not an element of bureaucracy.

Towards the general tendencies which the word "bureaucracy" implies Professor Freund and Mr. Robson are not intolerant. The legislative activities of public departments come within the former's survey, but not the latter's: neither of them is concerned with the present immunity of the Crown from actions in tort. Neither of them seems afraid of what Mr. Robson calls the bogey of political interference. In the movement by the executive to acquire judicial functions Mr. Robson sees nothing necessarily evil. "Providence," he says, "has not ordained any particular methods of allocating governmental powers"; it is a matter of expediency what powers are given to the executive or the judiciary at any particular moment; "the social welfare is the only valid test of what is desirable."

C. T. C.

LIABILITY OF PROPERTY OWNERS AND OCCUPIERS FOR ACCIDENTS.¹

THIS is a useful and well-written book, evidently the fruit of practical experience as well as of careful study of the cases. It gives all the important English cases and, in addition, brings together cases decided in Scotland, Ireland and the Dominions, and also a judicious *spicilegium* from the vast number of American decisions. The review of the Scots cases is particularly valuable, as in this branch there is no radical difference of principle between the two laws.

That the subject is eminently practical is shown by the fact that a large proportion of the cases here discussed are of later date than 1900. Many, perhaps most, of them are cases of negligence and it is inevitable that in discussing such matters as contributory negligence the author should deal with rules not at all peculiar to actions against owners or occupiers.

It would have been appropriate to notice that in Canada several of the Provinces have abandoned the doctrine of contributory negligence and have adopted instead of it the French rule which has always been applied in the Province of Quebec, viz. that where the accident resulted

¹ Findlay, Wm., *Law on Liability of Property Owners and Occupiers for Accidents*. (London: Sweet & Maxwell, 1928. Pp. 383. Price 21s.)

from the fault of both plaintiff and defendant, the damages should be reduced.¹

We think most people who have had experience of both systems will be of opinion that the French rule is more equitable. It rather shocks the sense of justice to read judgments for defendants on the ground of the contributory negligence of a child of four, as in *Cass v. Edinburgh Tramway Co.* (p. 154), or of five, as in *Shillinglaw v. Turner* (p. 63).

In Mr. Findlay's statement of the latter case on p. 63 there is an awkward misprint. Instead of "danger which could be avoided" we should read, of course, "danger which could not be avoided."

A fuller discussion of the judgments in that case would have been instructive.

Scots law has so far avoided many of the fine distinctions made in England between licensees, invitees and so forth, and has not made cases turn on the question whether the danger was of the nature of a "trap." The Lord President there says, "Every action founded on negligence is an action 'on the case.'" And Lord Sands suggests that there is still a difference of principle between the Scots and the English laws, though it is a somewhat subtle one. In Scotland the tendency is to hold that liability exists if the danger is one which a person, "though exercising ordinary care, may fail to observe," whereas in England it must be "a danger which a person can avoid only by the exercise of extraordinary caution." In Scotland "larger allowance is made for the fact that a careful person, in circumstances which are not suggestive of any danger, is not on the *qui-vive* for dangers." The statement on p. 158, "In cases where children are presumed not to have sufficient intelligence to be guilty of negligence, negligence may be imputed to their parents, so as to free defenders from liability," should be more clearly limited to Scotland. It is probably not law in England, though there are circumstances in which, as Salmond puts it, "the defendant is entitled to assume that the child will be duly protected by its adult guardian, and therefore is not in danger."²

We notice a slight error on p. 316. "In Canada . . . there is no liability on the part of the landlord to put or keep the demised premises in repair." This is not correct of the Province of Quebec, where the French rule to the contrary is followed.³

The book ought to find a ready market.

F. P. W.

PSEUDO-SECURITY.⁴

IN 163 pages, supplemented by bibliography and index, the author seeks to show that the arrangements under Articles 10 and 16 of the

¹ See *Journal of Comparative Legislation*, Third Series, vol. x, p. xxxi and p. 61.

² Salmond & Stallybrass, *Torts*, 7th ed. 54.

³ Civil Code of Quebec, art. 1613.

⁴ By J. M. Spaight. (London: Longmans, Green & Co., Ltd., 1928. 12s. 6d. net.)

Covenant of the League of Nations, for assuring the members of the League against aggression by means of a general guarantee of all the members to apply combined force, at the call of the League, afford only a pseudo-security, and that any such arrangements for general security by means of combined international force must be illusory, especially in view of the new conditions brought about by the use of air force, with its sudden and devastating methods of attack.

While there are some passages in the book that savour rather of distrust of the whole idea of the League of Nations, the author explicitly disclaims the intention of making any attack on the League in its capacity as a body for facilitating peaceful settlement of disputes and preventing war by means other than the use of force.

The book certainly brings home very clearly and convincingly the difficulties and risks of failure involved in the application of combined international force by the League as at present constituted, and contains trenchant criticisms of the proposals put forward a few years ago under the draft Treaty of Mutual Assistance and under the Geneva Protocol with the object of increasing the efficiency of the League's machinery for forcible prevention of aggressive war.

The author admits that a system of peaceful settlement of disputes is needed, and, coincidentally, some means of assuring that the peaceably disposed party shall not suffer through waiting instead of striking. He contends that a liability to penalty and reparation is not sufficiently deterrent, and must be supplemented by something in the nature of actual protection against attack if and when it occurs. He sees hope for this protection rather in a wide development of a system of regional pacts of the Locarno type than in the development of the principle of collective League responsibility for preservation of international order. His main reason for this view appears to be that regional pacts would be likely to succeed in practice because they would be based on the self-interest of the allied States, and that League obligations would probably fail to be carried out because based on the humanitarian motive of a desire for the peace of all nations under the sun. He suggests that the spread of pacts of the Locarno type would not tend to revive the old pre-war system of group alliances because they would be aimed at aggression by States that are parties to the pacts, and not by outside States. He further suggests at p. 162 that a system of Locarno pacts could be interlocked and co-ordinated by the League. This suggestion seems inconsistent with contentions contained in chapter vii that the Locarno pact is a break-away from, and a contracting out of, the League system, and that its most important stipulation is the undertaking to go to the assistance of the attacked party without waiting for any recommendation from the Council of the League.

The book is well written and the arguments are stated in a clear and interesting way, but at some points they seem specious rather than profound.

The peculiar circumstances which justified the Locarno Treaties, and made them a great instrument of peace and security in a dangerous area, have no counterpart elsewhere, and, however great an improvement they may be in themselves over an alliance of pre-war type, it is difficult to avoid the conclusion that a multiplicity of separate groupings of nations, even on the Locarno model, would involve dangers of rivalry and hostility between the groups, and possibly of friction within the groups, which are avoided by a general system under which all nations are responsible co-operatively for maintaining the common peace. Moreover, the idea that a general system must rest upon humanitarianism and not on self-interest seems fallacious. The Great War has proved that no nation can be sure of immunity from the repercussions of a clash of arms in any part of the world. It would be as much to the self-interest of every nation to have a universal peace, maintained continuously with the support of a general guarantee, as it is to the interest of every subject of the realm to have the King's peace maintained continuously throughout the realm with the aid of the general support which the law requires from all the people.

The author is on safe ground in emphasizing that the organization of a more complete system for ensuring the settlement of international disputes of every kind is required in priority to arrangements for the enforcement of peace, and he shows more clearness of vision and accuracy of statement than many writers on League topics in dealing with the position occupied by political, as distinct from legal, disputes, and by disputes arising out of matters of domestic jurisdiction as likely sources of war and as things which must be faced and provided for in a suitable manner by the international organizer who aims at a complete system for the prevention of war.

One is struck, on the other hand, with the author's failure to appreciate sufficiently the fact that the League is a growing organism and is likely to develop in a way which will alter the whole aspect of the problems and difficulties about which the author is concerned.

The United States has begun to move. The Kellogg Pact not only sets up an additional bulwark against war in cases where the League Covenant leaves loopholes, but also enables the United States to test the present attitude of other nations towards the complete renunciation of war. The next step should be for the leagued nations to sit down with the United States and the other States outside the League circle and determine how the basis of the League and the terms of its Covenant can be revised so as to give complete effect to the principles underlying the Kellogg Pact, and to perfect the machinery of the League, so that it can afford satisfactory means for the final solution of international disputes of every kind, legal disputes being subjected to the legal processes of judicial decision or arbitration, and other disputes to such other processes as may be appropriate. Once achieve this, and induce the outsiders to come inside the League, and thus give the League its

true character of an organization with universal authority and influence, and you will have turned the maintenance of international peace into a proposition of a different order, and caused the difficulties about compulsory enforcement, now troublesome, to crumble. F. N. KEEN.

CLASSICS OF INTERNATIONAL LAW.¹

THIS is No. 10 of the series of the Classics of International Law, republished by the Carnegie Endowment for International Peace. Vol. i contains a photographic reproduction of the edition of 1682 with a German introduction by Dr. Schücking, now of the University of Kiel; and vol. ii contains translations of Pufendorf's text by Professor F. S. Moore of Columbia, and of Dr. Schücking's introduction by Professor H. F. Wright of Georgetown University.

Pufendorf's work was first published in 1673, an abridged edition of his longer work *De jure naturæ et gentium*. Only two chapters out of thirty-five (chs. xvi and xvii of book ii) are concerned with international law, and Dr. Schücking himself regards the value of their contribution as slight. He makes the interesting point that they illustrate the tendency of a professed naturalist, such as Pufendorf was, to adapt his conclusions to the practice of the age.

But as a legal philosopher Pufendorf has had an important influence on the development of international legal theory, and the general editor, Dr. J. B. Scott, was doubtless right in including this work in the series. Dr. Schücking picks out Pufendorf's insistence on the concept of social duty as his contribution of most enduring value; the fundamental natural law, he says, is "*cui libet homini quantum in se colendam et servandam esse socialitatem*," a phrase which might almost be the Latin form of the formula "Do nothing to diminish . . . do everything to increase social solidarity," which the anti-naturalist M. Duguit derives for us from the *fact* of solidarity. "On veut d'abord le résultat," wrote M. Saleilles, "on trouve le principe après; telle est la genèse de toute construction juridique."

Unfortunately there is another and less beneficent doctrine of Pufendorf that has had more influence on later international theory, his doctrine that "*inter diversas civitates ac cives diversarum rerum publicarum*" there exists only the *status naturalis* in contrast with the *status civilis*. Pufendorf owed much to Hobbes, but Hobbes was too clear a thinker not to know that such premises made inevitable a denial of the existence of international law. It is hardly sufficient to say, as Dr. Schücking does, that Hobbes permitted the law of nations to be completely absorbed by natural law, and "thus opened up a line of development of which the standard-bearer is Pufendorf," without also

¹ *De Officio Hominis et Civis juxta legem naturalem libri duo*. By Samuel von Pufendorf. (New York; Oxford University Press, American Branch: 1927. 2 vols; pp. 30a + xxii + 167, and 27a + xii + 152. Price \$4.)

pointing out that Hobbes gave a new and degraded meaning to natural law, the implications of which were fatal to the logic of Pufendorf's system. For Pufendorf, like Hobbes, attempted to derive the origin of States from the purely self-regarding instincts of human nature, but he had not the courage of Hobbes ; his sovereign was supreme and irresponsible, and yet he might be limited and we even have a chapter on his duties. He seems to hover between the influence of the two authors by whom he was chiefly inspired, Hobbes and Grotius, and the two are fundamentally irreconcilable. Unfortunately international theory to-day is still too often insecurely based on this double foundation, and for this Pufendorf is partly responsible.

The translation has been well done, and is generally both accurate and readable. There are, however, one or two passages which need correction ; e.g. ll. 14-17 on p. 12a and ll. 17-22 on p. 15a do not make sense, and the first line of p. 20a seems to invert the meaning of Dr. Schücking's text.

J. L. BRIERLY.

GROTIUS.¹

THE new translation by Mr. F. W. Kelsey with several collaborators makes with the photographic reproduction of the edition of 1646 given in vol. i a very handsome book. Its value is increased by a most readable introduction from Dr. James Brown Scott, giving an account of the genesis and literary history of the masterpiece of Grotius.

At this time of day not even the youngest of reviewers would dream of reviewing the *De Jure Belli*. No law book since those of the great civilians has achieved such international fame as this. Eulogies, nowadays, are more restrained in tone than they were in the seventeenth century. We should hardly say of a legal writer what Heinsius wrote in 1614 as a motto for Miereveld's picture of Grotius :

Talem oculis, talem ore tulit se maximus Hugo.
Instar crede hominis, cætera crede Dei.

But is there anyone writing law books to-day which are likely to go to seventy-six editions and to be translated into almost all the languages of the civilized world ?

If Grotius were to revisit the world, he would rejoice to see the revival of faith in that law of nature of which he was the great expounder.

The translation, so far as we have been able to compare it, seems to be sound and scholarly and to preserve much of the dignity of the original.

F. P. W.

¹ Grotius, *De Jure Belli ac Pacis*. Vol. ii, Translation, Classics of International Law. (Carnegie Endowment, 1925, 1½ guineas ; or with vol. i, 2½ guineas. Clarendon Press.)

EXTRA-TERRITORIALITY IN CHINA.¹

MR. KEETON'S valuable work will undoubtedly rank for many years as the standard English authority upon the problem with which it deals, and it cannot be neglected by any serious student of the Chinese question. Its main value lies in the convincing proof which he affords that the extra-territorial system was not an injustice arbitrarily thrust upon China by force, but was imposed by the logic of facts as the inevitable condition of any commercial intercourse between China and the West. Extra-territoriality in a rough form existed in fact long before the Treaty of Nanking. No trade with Europe would have been possible without it, and of the advantages to be derived from this trade the Chinese merchants were keenly aware. Already in 1833 a British statute had made provision for the establishment of civil and criminal courts in China, and the Treaty of Nanking in 1842 only regularized a situation which already existed in fact. The general adoption of the system by all the western Powers which had substantial interests in China is sufficient testimony to its practical necessity.

The old China stood outside the realm of international law, not because of the difference in her form of civilization, but because her government denied the fundamental assumptions upon which international law is based. International law exists to regulate the intercourse between independent States, and the possibility of such intercourse was denied by an Emperor who persisted in regarding all other countries as barbarous and all other rulers as his tributaries and inferiors. In the seventeenth century a Chinese Emperor declined to interest himself in a massacre of Chinese by the Spaniards in the Philippines on the ground that any of his subjects who chose to leave China deserved anything that might befall them. The same policy of isolation is illustrated by the long-continued refusal of the Peking Court to receive the envoys of other Powers except upon humiliating terms. Whether or not international law justifies any State in cutting itself off entirely from the rest of the world is to-day an academic question that we are not likely to see raised in practice. But it is undoubtedly true that before 1842 China could claim no rights under international law, since she denied its fundamental postulates. The Treaty of Nanking marks the real admission of China to the society of nations, and the extra-territorial system was an essential condition of her admission.

Any such system is at the best a makeshift, and its actual working entails innumerable difficulties and inconveniences, as appears clearly from the report of the international commission which studied the whole question in China in 1926. Probably there is not a single European Power which would wish to maintain its extra-territorial rights for a day

¹ *The Development of Extra-Territoriality in China.* By G. W. Keeton, M.A., LL.M. (London: Longmans, Green and Co., Ltd. 2 vols., pp. xiv, 405 and 422. Price 42s.)

longer than is actually necessary. But the responsibility for these difficulties rests with the Government which fails to provide an efficient and tolerable administration of justice within its territory. In so far as the principle of an exclusive internal jurisdiction is recognized by modern international law it is conditional upon the attainment by each State of certain established standards of good government. The ultimate abolition of the extra-territorial system is as much in the interests of the western Powers as it is of China herself, but the achievement of this end cannot be hastened by ignoring present realities.

The history of the question falls into two parts, the Treaty of Nanking being the obvious dividing line. Mr. Keeton's very full historical account is lucid and readable throughout, and he has drawn freely upon much material which is not easily accessible to most students. A small slip may be detected in his reference to the Russo-Chinese agreement of 1689 known as the "Treaty of Nertchinsk" as an early example of extra-territoriality. This was rather an administrative agreement for the mutual surrender of bandits on a wild frontier—a rough kind of extradition. The form of the Chinese version, as given in De Martens' translation, makes it an order of the Emperor, thus preserving the Chinese fiction of world supremacy.

No two Powers exercise their rights in exactly the same way, and Mr. Keeton describes very clearly the different systems in force. Great Britain and the United States have gone farthest in the development of a complete and independent judicial organization. Lawyers will be especially interested in the author's learned discussion of the conflicting theories as to the juristic basis of extra-territoriality. Historically the system arose in response to urgent practical needs, and legal theory has followed a long way behind, but experience shews that a consistent legal doctrine is necessary for the solution of the problems that arise in practice.

The greater part of the second volume is taken up with appendixes, which give us an unusually complete documentation of the material in the body of the text.

H. A. S.

SOME RECENT BOOKS ON CRIMINAL LAW.¹

THE first of these three books is one of the series known as "To-day and To-morrow," which consists of a number of bold speculations as to the future of many sciences, arts and institutions. The writers are all competent, and experts in their various subjects, but they ignore the old

¹ *Cain, or The Future of Crime.* By George Godwin. (Kegan Paul.) Pp. 108. 2s. 6d. net.

Les Principes Modernes du Droit Pénal International. Par H. Donnedieu de Vabres. (Paris: Recueil Sirey Librairie, 1928.) Pp. 460.

Esquisse du Droit Pénal actuel dans les Pays-Bas et à l'étranger. Par O. Q. Van Swinderen. (A. W. Spöring & Zoon, Groningen.) Pp. 274.

maxim, "Never prophesy unless you know," and therefore their treatises contain a good deal of controversial matter.

This little book on the future of the criminal law is no exception to the rule. It contains a large amount of information in very small space, and is written in a bright and lively style, notwithstanding the serious nature of the subject, which renders it very interesting; but as to the accuracy of its forecasts there may be differing opinions.

The writer pays a high tribute to the administration of the criminal law in England as compared with its administration in the United States of America and in France :

A criminal trial in a British Court [he says] approaches more nearly to the passionless pursuit of truth than trial in the Courts of any other country in the world. The spirit is the spirit of fair play, with a strong bias, where doubt exists, in favour of the accused (p. 85).

In America, if we are to believe Americans, the Criminal Courts are dishonoured by widespread corruption, corruption upon the judicial bench which is without security of tenure, chicanery bordering upon conspiracy to defeat the ends of justice amongst the advocates with the subornation of jurors and faked police evidence, making up a picture of justice travestied (p. 86).

In France the whole proceedings of the Criminal Courts are coloured by emotion inside the court and prejudiced by "newspaper-trial" beyond its walls (p. 86).

The history of the law of evidence in England is the record of successive devices to safeguard the accused and assure him a fair trial (p. 86).

But it is not so much the administration of the law that he criticizes. What he chiefly complains of is a condition of society that renders necessary, and suffers to continue, the existence of the criminal law, which, he says, deals only with the effects and not with the causes of crime. "Crime," he says, "is a symptom of the sickness of society." He makes a number of suggestions as to what society ought to do, and probably will do, or attempt to do, in the future, with the view of removing the causes of crime and the temptations to commit it. Amongst these suggested means of prevention, or palliatives, are psychology, as a cure for anti-social conduct, and easier economic conditions of life.

The Criminal Court of the future will be a function of society shared equally by the lawyer and the psychologist (p. 92).

We doubt, however, whether the causes of crime are to be found only or mainly in these directions. So long as human nature remains what it is, so long as heredity and environment operate on character, so long will there be cases of recidivism and the forces of repression, prevention and punishment known as the criminal law will be necessary for the protection of society. The chief causes of crime at present are poverty, drink, idleness and lack of will-power; and until these are removed, crime will continue and it will be necessary to guard against it. The true antidote against crime is an improved state and tone of society and the development of a higher character on the part of every individual citizen, as the result of education and moral influences.

No observer can fail to note the greater care with which the criminal law is now administered, since the establishment of the Court of Criminal Appeal, and the greater spirit of humanity which has for a long time pervaded its administration. The reform of the criminal law and the removal of temptations to commit crime are matters of politics, not of law. Perhaps the most satisfactory aspect of modern criminal law is the decline in the number of crimes of violence, other than murder.

Mr. Godwin argues strongly in favour of the abolition of capital punishment, as one of the reforms which are likely to take place in the future, and certainly a good deal has been written and said about it of late. But we doubt whether the agitation in favour of its abolition has yet reached a point at which the strength of the opposition to it can be gauged. It is a difficult subject about which there is much to be said both for and against.

To say that capital punishment does not act as a deterrent because murders still occur, is futile. The same argument might be adduced against every crime. Every time a crime is committed, the criminal law fails in its purpose ; but can it be said, therefore, that the whole of the criminal law ought to be abolished ? To argue that the death-penalty ought to be abolished because murders have not increased (if it be a fact) in those countries in which the experiment has been tried is equally futile. Mere statistics cannot prove the deterrent power of a penalty, because it is impossible to prove a negative. One can only quote the well-known saying : *Que messieurs les assassins commencent.*

The second of these three books is a continuation of a subject previously discussed in the pages of this *Journal*.¹ In both these articles the principles of international criminal law (*le droit pénal international*) as set forth in the large treatise (five vols.) of M. Maurice Travers were considered. In the second article a former book by M. de Vabres was also reviewed. That book consisted of an historical introduction to the subject. M. de Vabres now returns to the subject in the form of an exposition of its modern principles. We are pleased to observe that the learned author has been promoted from a chair in the faculty of law in the University of Montpellier to a similar chair in the University of Paris. His new book has all the learning and lucidity we should expect from its author.

It is chiefly concerned with the vexed question of *compétence* (jurisdiction) territorial and international, and the advantages of the latter from the point of view of procedure and repression. The author points out the seriousness of international criminality and the necessity of overcoming it by the collaboration of States. Perhaps in course of time the League of Nations may be able to do something in this direction.

The third of these books, though written in French, is really a Dutch book, printed at Groningen in Holland. The author is Dr. O. Q. Van Swinderen (*Docteur en Droit et Ancien Président du Tribunal de l'Arron-*

¹ See *Journal of Comparative Legislation*, Third Series, vol. iii, pt. iv, p. 237 ; vol. v, pt. i, p. 90.

dissement de Groningue). It purports to be a sketch of actual Dutch criminal law and a comparison of it with the laws of other countries (*et à l'étranger*), and appears to be one (tome xiii^{me}) of a series of similar books. The learned author, having formerly been a judge, can no doubt speak with practical experience of the working of the Dutch system, and the book betokens great industry. It deals more particularly with a law of May 28, 1925, relating to the amplification and modification of the provision of the criminal law and the law of criminal procedure relating to persons who at the time of the commission of crimes by them were suffering from defective development or some disease of the mental faculties.

G. G. A.

CRIMINAL PROCEDURE IN PALESTINE.¹

THIS is an account very lucidly written of the law of criminal procedure in Palestine. It is intended primarily for law students, but, as its author was for a number of years the chief public prosecutor under the Attorney-General, it is based on much experience and should be useful to practitioners.

The criminal procedure of Palestine when that country formed part of the Turkish Empire was based on the French model. It has now been completely recast by post-war legislation and is now, broadly speaking, on English lines, though it still preserves some French features. It retains the excellent French practice of allowing a person injured by a criminal act to have his civil claim for damages combined with the criminal proceedings. An account of this system, as it is applied in France, was given in a recent number of this *Journal*.²

There are interesting provisions as to the prevention of crime, aimed mainly at preventing the riots and demonstrations which are apt to occur in a country like Palestine, where "religious" party spirit runs high.

The text of the Criminal Procedure Code is given in an appendix.

A curious feature of the Palestinian legal system at present is that there is no regular publication of judicial decisions. This accounts for the fact that few cases are cited.

Considering that the printing has been done presumably by printers unfamiliar with English, it reflects credit on the Jerusalem press.

F. P. W.

REPRESSION OF CRIME.³

M. MAURICE TRAVERS is the author of a standard work on international criminal law, *Le Droit Pénal International*, which was completed in five

¹ Kernack, S. G., *Handbook of Criminal Procedure in Palestine*. (Jerusalem: Tarbuth. Pp. 157, 10s.)

² "The Partie Civile in the Criminal Law of France," by Dr. P. O. Lapie, Third Series, vol. x, pt. i, p. 33.

³ *L'Entr'aide Répressive Internationale*. Par Maurice Travers. (Paris: Recueil Sirey.) Pp. 772.

volumes six years ago. The present imposing volume, nearly 800 pages long, is designed to bring the earlier work up to date, and more particularly to provide a commentary upon the French *Loi relative à l'extradition des étrangers* which bears date March 10, 1927. The generality of the title of the book is justified by the fact that the law in question deals not only with extradition, but with such matters as reciprocal assistance between Governments in respect of *commissions rogatoires*, the service of process, the subpœna of witnesses, the communication of documents, and what we can only describe as the loan of prisoners with a view to *confrontation*.

M. Travers, following the excellent tradition of French legal literature, is far from confining himself to present law of France; not only does he devote considerable space to the discussion of foreign laws, and of extradition treaties to which France is not a party, but he maintains an attitude of continuous criticism, with a marked bias in favour of the largest possible measure of international co-operation in the repression of crime. Thus he censures the authors of the new French law for the maintenance of the traditional refusal to grant the extradition of French nationals. He disapproves even more strongly of the English rule which requires the demand for extradition to be supported by such a measure of *prima facie* evidence as would justify a committal for trial: a requirement which he regards as furnishing the explanation of the comparatively small number of extraditions granted in England. In adopting this explanation M. Travers possibly overlooks the difficulty of crossing the English frontier.

M. S. AMOS.

AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE.¹

THIS book is a serious and careful study, on normal lines and without high lights, of the question of air bombardment. It is eminently "sane." The realities of the situation are not overlooked. The author has evidently no faith in the efficacy of any restrictive rules which, while desirable for humanitarian reasons, would be militarily disadvantageous to a belligerent.

As an historical résumé of the pre-war attempts to regulate air bombardment the book will be of lasting value. The author is careful to correlate the proposals made for this purpose at The Hague in 1899 and 1907 with the stage of development which human flight itself had reached at the one date and at the other. The readiness to proscribe bomb-dropping diminished in proportion as the art and science of aviation progressed. The Great War came to tumble and shatter the house of dreams in which those good people lived who had thought it practicable to ban or restrict drastically the use of aircraft as instruments of war.

In the Great War, as the author states, the general rule adopted was

¹ By M. W. Royse. (New York: H. Vinal, Ltd., 1928.) Pp. xv + 256.

that military objectives could be bombed wherever found. The fact that injury resulted to non-combatants and private property was not regarded as a hindrance. The same principle will undoubtedly be accepted as the basis of all future regulation. It was adopted by the Commission of Jurists, representing six States, which drafted a code of rules for air warfare at The Hague in 1923. The particular provision proposed by the Commission for this purpose is open to criticism in several respects, especially in its attempted discrimination between combat and other areas. Dr. Royse expresses justifiable doubts whether, in so far as it seeks to restrict the right to bombard military objectives regardless of their location, it will ever be found acceptable. He holds that "if an objective is of such a character as to be properly designated a military objective, no artificially created zones will prevent its bombardment."

The author gives a good deal of useful information regarding the air-raids of the Great War and their results. One or two of his conclusions are challengeable. He states, for instance, that air bombardment in the latter part of the war was directed against places (cities and towns) rather than against individual objects therein. This is untrue of the British raids. Definite military objectives were always assigned to bombing squadrons. Indeed, the comparative statistics are instructive upon this point. Great Britain was raided 103 times and Germany 305, according to Dr. Royse's figures. The casualties in Great Britain were 4,821, killed and wounded. Those in Germany, which he does not give, were 2,454 killed and wounded (Berlin telegram quoted in *The Times*, March 17, 1919). If our squadrons had really tried to attack cities as a whole the latter figure would have been enormously greater.

Dr. Royse's book is one for which all students of the subject will be grateful. It contains an excellent bibliography. J. M. S.

ORGANIZED AIR POWER.¹

THE subject-matter of this volume is hardly within the ordinary scope of this *Journal*, but Mr. Spaight has already established his authority as a writer on the law of the air, and students of his earlier work will be well advised to acquaint themselves with the historical development of aerial organization. The history of the British air force is clearly traced from its modest beginnings as a mere section of the Royal Engineers to its present position as a separate fighting service under a Minister independently responsible to Parliament. To this development Mr. Spaight sees a parallel in the early history of the Navy. In France, Germany and the United States the principle of separation has not been carried out to its logical conclusion. Mr. Spaight's reasoned and lucid account of this development should prove invaluable to the historical student and will be of material assistance to the lawyer. H. A. S.

¹ *The Beginnings of Organized Air Power*. By J. M. Spaight. (London: Longmans, Green and Co., Ltd. Pp. 317. Price 17s. 6d. net.)

THE LAW IN RELATION TO AIRCRAFT.¹

EXCEPT that the authors discuss in a few pages the bearing upon aviation of the principles of English law regarding trespass and nuisance, liability for damage and the carriage of passengers and goods, this book consists, as regards three-fourths of it, of "documents," and as regards the rest, of a summarized statement of the substance of the "documents." The "documents" are: the International Air Navigation Convention, 1919; the Air Navigation Act, 1920; the Air Navigation (Consolidation) Order, 1923, as amended down to February 1928; the Air Navigation Directions as amended down to the same date; the provisions of the Airworthiness Handbook (Air Publication 1208); the Order in Council of 1921 regarding Aircraft Wreck and Salvage; and the Investigation of Accident Regulations, 1922.

It is useful to have the various instruments collected between two covers, but it is right to warn those who consult the book either as a work of legal reference or as a practical guide for the would-be aviator, that subsequent regulations may also have to be consulted. The subject-matter of a book of this kind is constantly changing. New Air Navigation Orders and Directions have a way of appearing with disconcerting frequency. Already in 1928 *four* amending Orders in Council have been established and only the *first* of these is embodied in the book. Some of the subsequent Orders are of material importance; they contain, for instance, provisions modifying the rules regarding marks of nationality and registration and the lights to be carried by aircraft. The reader should be careful, therefore, to satisfy himself that any particular provision in which he is interested has not been superseded before relying upon its validity.

Subject to this qualification the book can be commended as giving in compendious form the documentary provisions of the law regulating aviation in this country. It is issued in most pleasing form by Messrs. Longmans, Green & Co.

J. M. S.

WOMEN IN HINDU LAW.²

THE author, while not abating his reverence for the sacred literature, is ready, like most Hindus to-day, to apply modern methods of criticism and to distinguish good and bad elements. He is typical of advancing India in this, also, that he is a strong advocate of improving the legal status of women. Unfortunately, his historical generalizations are much too sweeping in character; as, *e.g.*, when he instances *niyoga* as well as its prohibition as alike symptoms of the decline in women's status during the Sutric period. Similarly, in putting the blame for the present state

¹ *The Law in Relation to Aircraft.* By L. A. Wingfield and R. B. Sparkes. (Longmans, Green & Co., Ltd. Pp. vii + 304. 12s. 6d. net.)

² *Women in Hindu Law.* By K. T. Bhashyam Ayyangar, B.A., B.L. (Madras: S. Ganesan, 1928.) Pp. 48. As. 8. (Mysore University Extension Lectures.)

of the law on the broad shoulders of the British Government he overlooks the anarchy which in most parts of India immediately preceded our rule ; and he hardly appreciates the work of European scholars. On p. 37 is a fantastical jumble of the centuries followed by a statement that " the Institutes of Manu were translated by Colebrooke," the reference being to Colebrooke's *Digest* ! With the author's main object, however, we are in complete sympathy ; and with one or two exceptions he has been commendably careful to give references. The pamphlet may be read with pleasure and profit by those who know the subject.

S. V. FG.

A HISTORY OF ITALIAN LAW.¹

THIS is a long and complicated book. There are nearly 900 closely printed pages. It requires some study to make out its constituent parts and to attribute them to their several learned authors. One is confronted at the beginning with four prefaces by as many experts. The body of the book is taken up by the work of Senator Calisse.

Book I (pp. 1-216) is headed " Public Law." It is a translation, for the most part condensed, of Volume II of Calisse's *Storia del Diritto Italiano*, which was published at Florence in 1903. Pp. 208-12 are contributed by the translator, and pp. 212-15 were specially furnished by Senator Calisse for the volume.

Book II (pp. 217-492) is headed " Criminal Law," and is a translation of Calisse's *Storia del Diritto penale Italiano*, Florence, 1895. Pp. 486-91 are contributed by the translator.

Book III (pp. 493-804) is headed " Private Law," and is a translation of Volume III of Calisse's *Storia del Diritto Italiano*, Florence, 1891, but the part on " Private Law since the Unification of Italy " (pp. 791-804) was specially prepared by Senator Calisse for the translation.

There is one inconvenience in this. Senator Calisse, like other Italian jurists, devotes great attention to the bibliography of his subject, and the chapters which he has prepared for the present translation contain, when necessary, a bibliography which is brought up to 1925, if not later (see pp. 792, 797). On the other hand, the bibliographies which accompany the rest of the work do not come down later than the date of the original Italian editions (1891, 1895, 1903). It is a pity that they also have not been brought up to date. For instance, the bibliography at p. 219 of Germanic criminal law contains nothing published after 1895. It therefore contains no reference to the important works of His and von Amira. In speaking of Roman penal law, there is naturally no allusion to the great work of Mommsen. Indeed, the only book referred

¹ *The Continental Legal History Series. A History of Italian Law.* By Carlo Calisse. Translated by Layton B. Register. With Introductions by Frederick Parker Walton and Hessel E. Yntema. (Boston : Little, Brown & Co. Pp. lix + 827. 1928.)

to for Roman penal law is by Ferrini, who was, if I may respectfully say so, a better mystic than jurist. Albertus of Gandino, whose activities are described on p. 353, has been recently published with learned prolegomena. Such omissions in a work published in 1928 might mislead an incautious student.

It would be impertinent to praise the original of Senator Calisse. A translation of a law-book cannot be expected to be spirited. The most serious criticism that I can make is that there are occasional obscurities, especially where the original is summarized by the translator. For instance, p. 104: "In this the Church aided, adding solemn rites, conjurations and the severest penalties for those discovered guilty of falsehood, since, if not susceptible to his conscience, a false oath taken incurred much less danger." P. 118: "With the decadence of the Carlovingian dynasty the sovereigns of Italy succeeded in again winning submission of the imperial constitutions to the approval of the Italian assembly." P. 222: "With respect to the element of damage, it is necessary to distinguish different moments of time corresponding to different degrees of capacity, gradually acquired."

There are some curious words: p. 10, "Chancellery"; p. 242, "ancestrage"; p. 489, "factual."

Of misprints there are few. I have noticed the following: p. 4, n., "municipali" should be "municipi"; p. 13, n. 5, "Chênon" should be "Chénon"; p. 14, n. 1, "Padelleti" should be "Padelletti"; p. 23, n. 1, "Dieht" should be "Diehl"; p. 34, "apocrisarius," p. 56, "apocrysarius" should be "apocrisarius"; p. 127, n. 1, "Davidson" should be "Davidsohn"; p. 139, "Rheims" should be "Rens"; p. 462, "Senis" should be "Siena."

W. ASHBURNER.

THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION.¹

IN 1876 there was passed an Act of Congress which provided that "postmasters of the first, second and third classes shall be appointed and may be removed by the President with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." On July 21, 1917, one Myers was appointed by the President, by and with the advice of the Senate, to be a postmaster of first class at Portland, Oregon. On February 2, 1920, he was removed from office by the order of the Postmaster-General, acting by direction of the President, who dispensed with the concurrence of the Senate. On April 21, 1921, Myers brought suit in the Court of Claims for his salary from the date of his removal. Against an unfavourable decision, he appealed to the Supreme Court; and that

¹ *The President's Removal Power under the Constitution.* By Edward S. Corwin, Ph.D., LL.D., McCormick Professor of Jurisprudence in Princeton University. (New York: National Municipal League. Pp. xv + 70. Price \$1.50.)

tribunal, on October 25, 1926, gave a judgment which apparently excited great and general interest in the United States. Its effect, broadly speaking, is to lay down the principle that Congress has no power, under the Constitution, to impose any fetters upon the President's prerogative to dismiss, without reason assigned, any federal officer other than a judge. The Court was divided, the leading opinion being given by Chief Justice Taft (himself a former President), while Justices O. W. Holmes and Brandeis were in the dissentient minority. Professor Unwin's monograph contains a vigorous attack upon the Chief Justice's reasoning. He also lays stress upon the regrettable consequences which the judgment may have, in checking the present beneficent tendency, observable both in federal and in State affairs, to create authorities invested with quasi-judicial or at least impartial functions, for the proper working of which independence of the executive is essential. It is in view of this aspect of the Myers case that the monograph before us is sponsored by the National Municipal League. To the English reader it furnishes an extremely interesting example of an American Constitutional issue.

M. S. AMOS.

CONTRACTS FOR THE SALE OF SILK.¹

IN spite of its rather forbidding title this is a work of peculiar interest and value. It is a comparative study of the ordinary contracts for the sale of silk which are in use in the principal markets for that commodity—Lyons, Zurich, Milan, New York, Canton, Shanghai and Yokohama.

It deals fully with the history of the rules embodied in these contracts and with the special usages of the trade as to the preliminary steps prior to the formation of the contract of sale. In order to make these clear it gives a mass of information as to the processes employed in the trade. The third volume gives in full the rules of the different markets, specimen contracts, and the arbitration rules of the Silk Association of America. The author is a Japanese lawyer who has taken a doctor's degree at Lyons.

Such a work could hardly have been produced except in a faculty of comparative law and at the same time where it was possible to secure the assistance and advice of experts in the silk trade. It is natural, therefore, that this study should hail from Lyons, one of the most ancient and important centres of the silk trade, and that it should have been prepared with the help of M. Édouard Lambert, the learned Director of the *Institut de Droit Comparé de Lyon*, and also with that of the head of one of the leading firms of silk importers there.

As it happens, we are as a nation less interested in the silk trade than in some others, but, in spite of this, there is much in Mr. Ishizaki's book

¹ *Le Droit Corporatif International de la Vente de Soies*. Ishizaki, Masaichiro. (Paris: Giard. Price 100 frs.)

which deserves our study. We are encouraged to hope that it may be the precursor of works dealing on similar lines with other trades. The *Institut de Droit Comparé* at Lyons is a workshop of comparative law which has an astonishing output. As M. Lambert suggests, the cinema industry would be a particularly good field.

But this work illustrates, and illustrates extremely well, a tendency not limited to any single trade.

This is the desire on the part of persons forming a group, whether they be persons engaged in the same trade or members of a trades-union or otherwise, to withdraw their disputes from the ordinary Courts and to settle them *intra familiam* by arbitration and according to rules fixed by themselves. It is this "law of the group" which is here designated as *droit corporatif*, a term for which we have as yet no recognized equivalent. As M. Lambert points out, we are seeing to-day a sort of repetition of what happened in the early days of commercial law. Commercial law began in the recognition by the Court of the customs of traders. It was hoped that commercial cases could be dealt with not only in accordance with trade usages but also in a cheap and expeditious manner, and with a minimum of technicality. These hopes have not been fulfilled. Even where, as in France, commercial cases come in the first instance before Courts composed of traders, it has been found that, owing to the system of appeals to Courts composed of professional lawyers, and to other causes, it has not been possible to escape from the law and the lawyers.

In the silk trade, at any rate, as this book shows, a great effort is now made to do this.

All questions arising under the contracts must be decided by arbitration and according to rules carefully provided. The arbiters are to be experts in the trade; they are, as the American rules put it, "not to be restricted by legal technicalities," and they are so to conduct the proceedings as to ensure substantial justice. Above all, there is to be no appeal from the decision of the arbiters. We heartily commend this study.

F. P. W.

THE CHEQUE IN ANGLO-SAXON COUNTRIES.¹

THIS book, which deserves to be read by English readers, shows a careful study of English and American law and a very practical grasp of the subject. The author not only states the law very clearly and discusses it with ability, but she appreciates more than one would expect in a young writer the practical aspects of the question. She knows very well what some continental writers do not, that a cheque is a way of paying a debt and only occasionally an instrument of credit. The book is very well written and contains many good sayings, such as that the

¹ *Le Chèque dans les Pays Anglo-Saxons.* By L. M. Mitchell, *Docteur en Droit*, (Paris: Rousseau.)

English willingness to take cheques in payment arises perhaps from the "sporting" character of the people. It is difficult for us to realize how much less use is made of cheques in France than with us. There are no doubt many reasons for this, and among them the slowness of French bankers in informing their customers as to the state of their accounts. The customer usually sees his pass-book or a copy of his account only at intervals of three or even of six months. Another reason is the complicated state of the French law as to bills and cheques. And we may say in parenthesis that French commercial law generally is badly in need of thorough revision. As to cheques the author wittily says: "Le chèque est étouffé par la sollicitude du législateur. C'est un malade que le médecin intoxique de remèdes quand il lui faudrait un peu d'air" (p. 107). But whatever the reasons may be, the fact is certain that in France cheques are still regarded with much suspicion. A large number of private persons, many of the *paysans* and even not a few of the smaller traders hardly employ them except to draw out money for themselves from what is in fact if not in name a deposit account. Miss Mitchell's clear explanation of the convenience of cheques and the security given by crossing, especially when they are crossed "account payee," will do a good deal to spread knowledge of English and American practice. It seems rather odd that in England itself we have never introduced the American and Canadian practice of using cheques "certified" by the banker, a practice very extensively employed on the other side of the Atlantic, and extremely convenient.

F. P. W.

THE SCIENCE OF LAW AND ROMANTICISM.¹

THE second title of this work gives a better idea of its contents—*Le Conflit des conceptions juridiques en France de 1880 à l'heure actuelle*. It is a detailed study of the various theories as to the nature of law which have been supported in France during the last generation. The method adopted is quite novel in a law book. The writer gives long extracts from the different writers before he proceeds to discuss and criticize their views. We are able in this way to perceive very clearly the main currents of thought, and, long as the book is, those who begin it will read to the end. Its main contention is that the same tendency, which in literature is known as romanticism, manifests itself in many legal writers. Romanticism he defines as "la prédominance accordée à l'imagination et à la sensibilité sur la raison." The qualities of classicism, on the other hand, are "le bon sens, le goût, la mesure, la possession de soi, le contact perpétuel avec la réalité." And M. Bonnet adds that in romanticism there is also an element of mysticism. He is, as we might infer from his definitions, a stout champion of

¹ *Science du Droit et Romantisme*. By Julien Bonnet. (Paris: Sirey 1928. Pp. 745, 60 frs.)

classicism, and he ranks as romantic writers M. Duguit and others of his school who, while claiming to be scientific realists, are always heralding the dawn of a new day, and telling us that the old laws are not suited to the new world.

According to M. Bonnecase, Duguit is no more a realist than Zola. Both see the facts through a rosy haze of sentiment.

There is gross exaggeration in such statements as that of M. Gaston Morin in his book *La révolte des faits contre le Code*: "Le destin nous presse d'instaurer un droit nouveau dans les grands domaines juridiques; la famille, la propriété, la vie économique."

The theory in which all these writers believe, that every human society is like a living organism which has its youth and its maturity and must fade and grow old at last, is pure mythology.

To affirm that law derives its sanction from the sentiments of a society at a given moment is to build on shifting sand. The only sure foundations for the law are those principles of justice which, broad and general as they may be, are nevertheless immutable.

All students of the philosophy of law will find their profit in the work of M. Bonnecase.

F. P. W.

SPECIFIC PERFORMANCE.¹

THIS is a competent and valuable study. It illustrates very well the practical value of the comparative study of law. The English action for specific performance is in appropriate cases a better remedy than any found in the armoury of the civil law. Within the last half century, it is true, the French Courts have frequently achieved the same results by the ingenious device of imposing what is called an *astreinte*. This is a judgment ordering the defendant to pay after a certain delay a recurring sum usually fixed at so much a day until he fulfils his obligation. *E.g.*, in a case where an electric light company had refused to fulfil a contract to supply light to an hotel the company was ordered to pay 10,000 francs a day till it supplied the light.² Many French writers have disputed the power of the Courts to issue judgments of this kind.³ The resistance to the *doctrine* has now grown weaker, but it must be admitted that the practice of *astreintes* is difficult to justify in principle. In Italy it has hardly established a footing. It is perhaps regrettable that this question is not settled in the draft of the articles by which it is proposed to unify the French and Italian laws as to obligations and contracts. On the other hand, the new draft code of civil procedure for Italy not only legalizes *astreintes* but contains articles authorizing a judgment ordering specific performance in certain classes of cases, and—an interesting innovation—creates a *bureau exécutif* attached to

¹ *L'Exécution Spécifique des Contrats*. Barda, Ernest. (Paris: Dalloz. Price 25 frs.)

² Cass. 1 décembre, 1897; Dalloz, 98. 1. 289.

³ See *Aubry et Rau*, 5th ed., 4, s. 299, text and note 17.

each Court, for the purpose of assisting the Court in enforcing the execution. M. Barda thinks that in the application of these new texts the Italian Courts may be guided a good deal by the English rules as to specific performance.

F. P. W.

TRANSACTIONS OF THE GROTIUS SOCIETY.¹

THE volume contains as usual some very good reading. We may note specially the valuable account by Mr. Wyndham Bewes of "The Monroe Doctrine and Entangling Alliances," and the paper (not too discouraging) by Dr. A. D. McNair on "The Present Position of the Codification of International Law."

An interesting article by Mr. E. H. Bodkin on "The Minor Poetry of Hugo Grotius" is, so to speak, a holiday exercise for the Grotius Society.

Outside its ranks we suspect that the readers of the Latin poetry of Grotius, in this country at least, are not very numerous.

It is amusing to find the great man writing *Epithalamia* containing passages expressed with Georgian freedom.

CIVIL CODES.²

To students of foreign laws who read German we heartily commend this series of codes. The method is to give first a short introduction, and then in parallel columns the foreign code with a German translation with footnotes. The Civil Code of Brazil and the first part of the Soviet Civil Law, containing the family law, have already appeared, and the Codes of Austria, Holland, Scandinavia, Spain, Turkey, Portugal and Mexico are to appear shortly, as well as volumes on the English and American laws. Other codes are promised later.

The present volume contains the first half (roughly) of the French Code covering civil status, marriage, guardianship, property, succession and gifts. Four writers have contributed the notes, each taking a certain section of the work.

The notes are short and to the point. They cite the latest cases and the newest books, and are well fitted to put the student or the practitioner on the right track.

F. P. W.

PERMANENT COURT OF INTERNATIONAL JUSTICE.

AMONGST the matters dealt with in this Fourth Annual Report³ may be mentioned as being of special interest, the speech made by

¹ Vol. xiii. (London: Sweet & Maxwell, 1928. Pp. 186, 7s. 6d. net.)

² *Die Zivilgesetze der Gegenwart*. Band I, Frankreich, Code Civil, Erste Hälfte. (Berlin: Bensheimer, 1928. Pp. 322, M. 22.)

³ *Fourth Annual Report of the Permanent Court of International Justice*, June 15, 1927-June 15, 1928 (Publications of the Court, Series E., No. 4).—A. W. Sijthoff's Publishing Company, Ltd., Leyden (Netherlands). Pp. 550. 8vo.

President Huber at the conclusion of his period of office as President ; the speech made by M. Anzilotti upon taking up his duties as the new President of the Court ; the settlement of the question of the diplomatic privileges and immunities of judges and officials of the Registry, and the admission of national judges in advisory proceedings.

Chapters IV and V, with the accompanying analytical index, in themselves occupy more than 100 pages of the Report ; they give summaries of the five Judgments and two Advisory Opinions given, and also of the chief Orders made by the Court during the period 1927-8. In the first category should be mentioned the Judgment given by the Court in the case of the collision between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt* ; and in the second category the important Opinion given in the question of the jurisdiction of the European Commission of the Danube.

The Bibliography (Chapter IX) supplements and continues those contained in previous Reports ; it includes more than 400 new titles of works, essays and articles concerning the Court.

In the last place, Chapter X of the Report completes the third edition of the *Collection of Texts governing the jurisdiction of the Court* and the first addendum published in the Third Annual Report. It contains in particular new international agreements concluded or published since June 15, 1927. These instruments number 47, a figure which, by itself, will suffice to indicate the recent expansion of the idea of international arbitration of which the Permanent Court itself is so far the most striking manifestation.

We have to acknowledge :

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International Economic Relations. By John Donaldson, Ph.D. (London: Longmans, Green & Co., Ltd.) Pp. xxx + 674. Price 16s. net.

Canada and World Politics. By Percy Ellwood Corbett, M.C., M.A., and Herbert Arthur Smith, M.A. (London: Faber & Gwyer.) Pp. xvi + 244. Price 7s. 6d. net.

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THE AMERICAN RESTATEMENT OF THE LAW OF CONTRACTS.

[Contributed by PROFESSOR P. H. WINFIELD.]

THE official draft of "*The American Law Institute. Restatement of the Law of Contracts*. Chapters I-VII, Sections 1-177" was issued on September 15, 1928, but copies for review have only recently arrived in England, and this explains the apparent tardiness of an estimate of it in this *Journal*.

The danger of misunderstanding the nature and aims of these restatements of the law is so great that it is better to examine such external matters before passing to the contents of the book itself. This is all the more advisable because the information procurable on these topics must be sought elsewhere than in the book which is one of the first results of a scheme planned several years ago with much toil and deliberation, and embracing in effect the whole body of case law in the United States. It is something of a paradox to say that the very magnitude of this task forced American lawyers to undertake it. Every criticism of case law which Bentham and Austin passed upon the English system applies with tenfold force to American case law. Forty-eight separate jurisdictions of course create a far greater mass of reported decisions, and the "incognoscibility" of these is much aggravated by a variation in judicial ability which is wider than with us. Let any English judge put himself in the position of an American appellate judge who, like his English brother, has to render a decision with reasonable promptitude, and he will realize the difficulty of considering adequately all the reported cases on the point before the Court. Something in the way of reforming this state of things was urgently needed. But no greater mistake could be made than to regard these restatements of the law as a codification of it in the sense of substituting for case law a statutory condensation of its principles. No American lawyer contemplated that, and it is improbable that he would have been a party to any scheme that had such an aim, for its practical difficulties would have made it mere folly. What the

restatement is intended to do is precisely what Sir Frederick Pollock has recently contended it ought to do—to lay down rules which will be acceptable to a well-informed Court of last resort. To do more than that would have been mischievous. There is, of course, no reason why any particular State in the Union should not give legislative effect to each or all of these restatements, if it sees fit; but if one grasps correctly present tendencies it is not likely to take that course. An independent observer cannot but admire the sound practical spirit which has inspired those who conceived the scheme, and, if this restatement of the law of contracts is a fair sample of what is to follow, the skill with which it is being executed.

So much for general considerations. We can now pass to an investigation of the contents of the book before us, especially from the standpoint of comparing them with the English law of contract. The reporter is naturally Professor Williston. It would have astonished Englishmen if it had been anyone else than this pillar of the Harvard Law School. It is gratifying to notice among the advisers who have assisted him Professor Arthur L. Corbin and Professor William E. McCurdy. The book is only a first instalment of the Restatement of the Law of Contracts and comprises in effect the formation of contract, contractual rights of persons not parties to the contract, assignment of contractual rights and delegation of the performance of contractual duties. Thus while the effect of mistake and fraud on the formation (which appears more accurate than “existence” as used on p. 81) of a contract is treated in s. 71, the treatment of them as grounds for avoiding a contract which has actually come into being is to be embodied in a later part of the work. This is important, because the reader may be misled by the absence of “Mistake” in the index, or of any use of the word on pp. 70, 82, where examples and rules occur which, whether scientifically or not, are usually regarded by English lawyers as appropriate to that rubric. Again, negotiable instruments are to be dealt with in a restatement especially devoted to them (p. 24). In the comments which we are about to make it will appear that we venture to express some doubts on one or two points. We hesitate to express any, because revision of the draft has been so thorough at the hands of the reporter, his advisers, the Council, the bench, the bar and the teachers of law, that a reviewer, if he has any adverse criticism to offer, had better start with a strong presump-

tion that he is wrong and has failed to appreciate all the bearings of any proposition with which he does not agree.

S. 1 defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." S. 14 shows that the latter part of this is inserted in order to include unenforceable contracts. The definition also takes in "void, voidable, . . . formal, informal, express, implied unilateral, bilateral" contracts. We are given to understand on good authority that it also comprises "unlawful" or "illegal" contracts, or, at any rate, that the word "void" does so; but so far as the text goes a reader might be puzzled to say whether this were so or not. S. 19 would lead him to infer that "void" included "illegal," yet "illegal" is certainly not taboo as a term, for it appears in s. 50 apparently in the same sense as is indicated by the phraseology of s. 19. Nor does this exhaust the queries as to "void," for the "Special Note" at the foot of p. 28 appears to contradict p. 18, comment (e), unless at this earlier page "void" has some different meaning which must be guessed. Finally it is not clear whether the circumstances which constitute illegality are to be considered in a succeeding part of the restatement.

According to the definition, one essential of a contract is a promise which, we are told, "must be distinguished from a statement of intention or of opinion" (p. 20). It is perhaps too late in the day to expect anyone familiar with Anglo-American law to urge, with much prospect of success, that a promise itself is a statement of intention as to the future. In our system, at any rate, a deliberate misstatement of such intention is just as fraudulent as a deliberate misstatement of any other fact. Where there is no such falsity there is no fraud, and this is all that is meant by the misleading proposition in many of our textbooks that, for the purposes of liability for fraud, a mere promise or a statement of intention is not a statement of fact. S. 4 defines a term of which no technical use has been made in English law. "A bargain is an agreement of two or more persons to exchange promises or performances." This, as the comment informs us, is narrower in meaning than agreement, since it applies only to a particular class of agreements; but it is broader than "contract," because it includes not only conveyances of goods but also the giving of an insufficient consideration in exchange for a promise.

It does not appear whether the draftsmen of the Restatement contemplate further use of the term. No reference to it is discoverable in Professor Williston's classical treatise on Contracts. The troublesome problem of quasi-contracts is briefly noticed on p. 22. They are not even implied contracts because they are not based on the apparent intention of the parties to undertake the performances in question; nor are they promises. "They are obligations created by law for reasons of justice." A hasty retort would be, "So are all obligations in tort." But no completely satisfactory definition of quasi-contract has ever been framed, and, if our memory serves us, none was attempted by William A. Keener, whose book, though more than a generation old, is still the leading authority on this topic. It would be foolish to quarrel with a useful and necessary head of the law merely because its application in particular cases is difficult, or because the fixing of its limits has baffled everyone from the Roman classical jurists onwards. S. 20 shows how thin the line between quasi-contract and contract may be when it lays down that "neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential." The comments on both these sections by Mr. Whiteside in "Annotations to the New York decisions" may be profitably consulted.

A curious question may be raised on the rule that an offer must become known to the offeree. One illustration of this (p. 41) is: "A sends B an offer through the mail to sell A's horse for \$500. While this offer is in the mail, B, in ignorance thereof, mails to A an offer to pay \$500 for the horse. There is no communication of A's offer, and there is no contract." So far, all is clear. But there is some possible doubt whether B's offer is an offer at all, for (p. 42) "all promises of this kind are offers, if there has been no prior offer of the same tenor to the promisor." Now this is precisely what has happened in the case put. There has been a "prior offer of the same tenor to the promisor." Therefore B's offer is no offer. But what is it then? The illustration, at all events, describes it as such. In fact, "offer" seems to be used in variant senses in the two passages.

An English lawyer would shrink from going the whole length of the assertion that "since an offer is a promise, and as a promise becomes a contract if consideration is given for it or if it is under seal . . . an offer may also be a contract" (p. 44). Agreed as

to an offer under seal, but query as to consideration ; for the quotation implies that the *mere* offer in such circumstances is a contract. Indeed the identification of offer with contract seems quite as likely to cause confusion as the placing of the two ideas in antithesis.

S. 39 deals with a point on which, as the learned reporter notes, there is singularly little authority. Rejection by mail or telegram does not destroy the power of accepting an offer until received by the offeror, but it limits the power so that a letter or telegram of acceptance started after the sending of the rejection is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection. Professor Williston shows, with good reason, that any absolute rule either that rejection is always effective when despatched, or that it is never effective until received, might possibly lead to unjust results (pp. 229-30).

That unsatisfactory case, *Dickinson v. Dodds* (1876) 2 Ch. D. 463, left unsettled two questions : (a) Is it material whether notice of revocation of an offer comes from the offeror or from some third person ? (b) Is consideration necessary in order that an offer should be kept open for a certain time ? As to (a), the rule in the Restatement is that, in sales of any kind of property, the offer is revoked if the offeree acquires reliable information that the offeror has sold or contracted to sell the property to anyone else (s. 42). This may not be an ideal answer to the question, but it is better than the uncertainty of English law and, for the rest, Professor Williston indicates that, in the present state of American authorities, the rule could not safely be expressed in broader terms (pp. 230-31). As to (b), s. 47 provides that an offer cannot be terminated during the term therein stated, or if no term is therein stated for a reasonable time, either by revocation or by the offeror's death or insanity, if by a collateral contract the offeror has undertaken not to revoke the offer. No doubt this represents current American authority, but it is not easy to see why, on principle, this collateral contract should be requisite in order to prevent revocation of the offer before lapse of a period of time which the offeror has specified. If I say to you, " I will sell you this book for £1, offer to remain open till four p.m.," why should extra consideration, or (what is really the same thing) a collateral contract be needed to make the time limit binding on me ? Have I not presumably taken into account the detriment which the delay imposes on

me, when I fixed the price at £1? But perhaps "collateral contract" bears some meaning which we have not grasped.

A slovenly assertion often heard in court and in the lecture-room is that mere silence on the part of the offeree can never constitute acceptance of the offer. A study of the rules laid down in s. 72 and of the luminous commentary on them (pp. 236-40) shows how misleading such an assertion may be. If we may say so, these rules appear to be just and practical. None of them puts an unfortunate householder at the mercy of pushing tradesmen with whom he has never communicated and who send to him goods which he has never solicited. If he "exercises dominion over chattels which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance." This relieves him from liability in contract or (at any rate in our system) in tort if he does nothing which can be regarded as an "exercise of dominion." It has been alleged in English law that he can even destroy the goods without compensating the sender, but the authorities do not warrant the inference.

S. 75 states that "consideration for a promise is (a) an act other than a promise or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise." The heading (c) might strike one as superfluous. Is there any imaginable instance of (c) which will not fall under (a), (b) or (d)? We understand that there was some difference of opinion as to the necessity of inserting (c), and that its appearance in the section was in deference to one of the learned advisers. The theory seems to be that, even if the creation, modification or destruction of a legal relation may be an "act" as in (a), yet the sole matter of importance in (c) is the *result* of something or other, be it an act or anything else; and this makes it perfectly indifferent whether what produces the result is an act. S. 75 concludes with the rule that consideration "may be given by the promisee or by some other person." Of this more will be said shortly when we consider the possibility of action by that "other person." For the moment it is enough to observe, as the reporter does (p. 241), that the rule is opposed to the repeated statement in the English books that consideration must move from the promisee. S. 84 (d) takes us to a corner of the tilt-yard where many a lance has been splintered on the sufficiency of consideration. "Consideration," it lays down, "is not in-

sufficient because of the fact . . . that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration." The controversy as to the soundness of this rule is familiar enough to every well-taught English and American student. In the opinion of the reporter and his advisers it is not only correct from a practical standpoint, but is a logical consequence of the test of the sufficiency of consideration usually given in the books—is there a detriment to the promisee or a benefit to the promisor? Numerically, the American cases which hold the consideration to be insufficient outweigh those upholding it, but not much importance need be attached to that. Professor Williston also claims that the English law supports the rule. We should be glad to think that it does, but we must confess to doubts upon the point. S. 84 contains another clause which makes compositions with creditors binding. That is similar to English law, but various suggestions as to what constitutes the consideration for the creditors' promises to abate a portion of their lawful claims have been made on both sides of the Atlantic. A modern English authority, *West Yorks &c. Co., Ltd. v. Coleridge* [1911] 2 K.B. 326, would appear to take the rule right out of the doctrine of consideration. American argument in the Restatement keeps within that doctrine and puts forward no less than five ways in which such consideration may be found: (a) part payment of the sum due to the creditor; this the framers of the Restatement dismiss as insufficient and so would any English lawyer; (b) the promise of each creditor to forgo a portion of his claim; this is consistent with s. 75 (2), but not with English theory; (c) forbearance (or promise thereof) by the debtor to pay the assenting creditors more than equal proportions; it is doubtful whether this accords with English theory; (d) the action of the debtor in securing the assent of the other creditors; this might well suffice in English law; (e) the part payment made to the other creditors; s. 76 makes this sufficient for American law; it will not do for English law.

S. 90 is extremely interesting to an English lawyer, for the broad doctrine propounded in it is not to be found in our books. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by

enforcement of the promise." Thus, if A promises B to pay him an annuity during B's life, and B thereupon resigns a profitable employment, as A expected that he might, and B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment, A's promise is binding. What, then, becomes of the doctrine of consideration? Professor Williston's answer in his note on this section (pp. 245-50) is that, in a number of American cases at the present day, it is law that reliance on a promise, though there has been no consideration for it, renders the promisor liable. Thus, charitable subscriptions are generally enforced in the United States at least after action in reliance upon them has been taken. He brushes aside the argument that the acts so done furnish consideration, and favours the ground of "promissory estoppel" which has been frankly stated by some Courts. There are several other examples of this kind of liability given in the note, which need not be detailed here. We should like to see the rule of s. 90 incorporated in English law. It may seem rather vague, but the Courts could be trusted to make wise use of the limit, "if injustice can be avoided only by enforcement of the promise." Again, it may be objected that it is glaringly inconsistent with the principles of consideration. The reply to that is twofold. First, it is not a whit more inconsistent than some of our English decisions in which the barest lip-service was paid to those principles and which have cast upon modern writers the heavy burden of reconciling the irreconcilable. A frank abandonment of the doctrine in these circumstances would have been better than tortuosity in explanation verging on unintelligibility, and it would have been historically justifiable when one recollects the jerks and twists in the development of consideration. Secondly on principles of common justice, why should a promisee who has reasonably relied on a promise of this kind, and has acted upon it, be deprived of a remedy? S. 90 not only lays down a clear and broad rule that will cover the American decisions, but would also rationalize some odd English cases, and, we believe, would make no real alteration in English law.

As to contracts under seal, we need do no more than note that s. 102 throws overboard *Xenos v. Wickham* (1867) L.R. 2 H.L. 296. Not much effort was needed for the jettison, for it was by no means universally followed in the States, some of which required from the maker an act of relinquishment of the

custody or control of the instrument. With us, nothing but an Act of Parliament can now alter the law.

Under Chapter V ("Duties and rights where more persons than one are promisors or promisees of the same performance"), two sections provoke comment for purposes of comparison with English law. S. 123 provides that while discharge of one of a number of joint and several promisors will put an end to the joint duty of the others, it will not extinguish their several duties, except to the extent required by the law of suretyship. This is contrary to early English decisions which wipe out several, as well as joint, liability in such circumstances. Coke's reasoning in support of this was recognized as inadequate *In re E.W.A.* [1901] 2 K.B. 642, but the Court thought that it was too late to question the rule. American decisions leave the law uncertain, and the best reason for s. 123 seems to be its "logical and practical desirability." S. 125 exempts from liability the estate of a deceased joint promisor unless all the surviving joint promisors are insolvent, and the estate will not be liable even then if the deceased promisor were a surety. Even with these limitations, the rule is more favourable to the creditor than that in English law, which gives such a creditor no relief against the deceased's estate unless the joint obligation be that of a partnership. American authorities in support of s. 125 are respectable enough, for they include a decision of the Supreme Court.

It was observed above that the Restatement sees nothing objectionable in the giving of consideration by some person other than the promisee (s. 75). A short step from this takes us to another question. Where performance of a promise in a contract will benefit a person other than the promisee, can that other person sue the promisor? The whole of Chapter VI (ss. 133-47) is occupied with this topic. Apart from some well-recognized exceptions, English law answers the question in the negative. If it took the opposite view then purists allege that the idea of privity of contract would be violated; the perfect sphere would be marred by an indentation or a protuberance. But whether the purists are really correct in thinking that, in existing English law, there has been no distortion of the sphere is perhaps open to question. Professor A. L. Corbin, who, be it noted, is Special Adviser in this Restatement, contends in an article which will be published in the next number of the *Law Quarterly Review* that it is only by a dexterous manipulation of

trusts that we have been able to save our faces here, and that in this connexion the word has become a shibboleth which has ceased to have a basis either in fact or to be consistent with the needs of the community. He urges in effect that if the Courts wish to confer an action on the third party, they find that there has been a trust in his favour and therefore make him a *cestui que trust*, but that, if they are unwilling that he should sue, they fall back upon the sanctity of privity of contract. Whatever be the true position in England, the idea of allowing the third party to sue the promisor has steadily progressed in America, and there is little reason to think that the rules laid down in the Restatement will not be generally adopted by the courts. S. 133 begins by styling the third person a "beneficiary" and proceeds to classify him under three heads: he may be (a) a donee beneficiary if it appears that the purpose of the promisee is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary; (b) a creditor beneficiary if no purpose to make a gift appears, and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary; (c) an incidental beneficiary if the facts stated in (a) or (b) do not exist. The beneficiary in (a) or (b) can himself bring an action against the promisor; in (c) he cannot. Further, the rights of the beneficiary in (a) and (b) are in the main identical, the chief exception being that in (a) the promisor's ability to vary his duty to the beneficiary by agreement with the promisee is much more restricted than in (b); see ss. 142, 143.

From Chapter VII (Assignment of contractual rights and delegation of the performance of contractual duties or conditions) it has been already stated that negotiable instruments are excluded. So too are the benefits and burdens attached to successive owners of property in virtue of a contract in a prior conveyance or lease. They are to be the subject of a separate Restatement. As to the kind of right which may be assigned, the only limit (apart from prohibition by law or by the terms of the contract creating the right) is that the substitution must not vary materially the duty of the obligor, or increase materially the risk or burden imposed on him by his contract, or impair materially his chance of obtaining return performance (s. 151). This would exclude the assignment of rights to purely personal

service. Subject to s. 151, a right expected to arise in the future, under a contract or employment in existence at the time of the assignment, can be effectively assigned. If the contract or employment is not then existing, assignment of the expected right operates only as a promise to assign, and it imposes no duty upon the obligor and does not preclude garnishment by the obligee's creditors (s. 154). Such is the rule upon a topic much litigated in the States. A contract to assign a right in the future is not an assignment (s. 166). S. 156 makes possible assignment of a fractional part of a right; English authorities are in conflict as to this with respect to assignment at law. The next section is, on the face of it, refreshingly simple to English lawyers taught from their early years to distinguish between assignment at Common Law, in Equity, and by Statute. "A right can be effectively assigned either orally or by writing." But the comment instantly corrects this impression of simplicity by adding that statute occasionally requires writing to give full effect to an assignment, and that, apart from statute, legal consequences often differ according as the assignment is under seal, given for value, or accompanied with delivery of tangible evidence of the right. A gratuitous assignment is revocable, but the exceptions (which are too long to be detailed here) are liberal. Delegation of duties, as distinct from rights, is allowable unless performance by the person delegated would vary materially from performance by the person liable, or unless the delegation is forbidden by law or by the contract (s. 160). On the question of priorities in assignment, s. 173 is remarkable for its rejection of *Dearle v. Hall* (1823) 3 Russ. 1. Subject to exceptions which are chiefly in favour of a later assignee who purchases his assignment for value in good faith, a prior assignee is preferred to one who is later. About half the American decisions take this view. As they include one of the Supreme Court, the Restatement not unnaturally adopts the same line. At least it relieves the draftsman from the search for some solid principle on which to base *Dearle v. Hall*.

Such is a short account of the first portion of an excellent piece of draftsmanship. It ought to be in the hands of every teacher of the law of contract in England, and its significance lies in the fact that it is not a Benthamite code but an acute interpretation of American case law.

AUSTRALIA'S TREATY RIGHTS AND OBLIGATIONS.

[Contributed by PROFESSOR H. K. BAILEY, M.A., B.C.L., *University of Melbourne.*]

ONLY by reference to her *tria capita* of League member, British Dominion and federal State, and to her restrictive tariff, alien immigration and navigation policies does Australia's treaty position become explicable. Moreover, Australia as a political entity is but young, and some of her treaty relations are an inheritance from pre-federal days and pre-dominion stages of constitutional development.

Position within the Empire. Commercial Relations.—Australia's position within the Empire may first be examined, taking commercial relations separately from political, since colonial self-government in external affairs has grown faster and farther in commercial than in political relations. For a generation after the establishment of responsible government, commercial treaties concluded by the Imperial Government automatically bound the Australian colonies. But in 1877 the Imperial Government agreed for the future to negotiate commercial treaties in such form that self-governing colonies should not be bound unless they adhered separately. In 1899 the Imperial Government embarked upon the further policy of securing for the colonies in all new treaties a right of separate withdrawal as well, and to obtain a similar privilege as occasion offered with respect to existing treaties. Imperial commercial policy was consistently based on free trade principles, and the Australian colonies before federation exercised freely their right of non-adherence to Imperial treaties. The Commonwealth has exercised still more freely both this right and that of separate withdrawal.

True, the Commonwealth is still bound by some sixteen pre-1877 treaties, and by eight later ones in virtue of separate adherence. But these deal rather with some detailed specific matter of international concern—as trade-marks, companies or wrecks. From

almost all the general treaties of commerce and navigation the Commonwealth has withdrawn. The Anglo-Italian Treaty (1883) remains, though the Commonwealth attempted in 1909 to secure the right of separate withdrawal. It provides *inter alia* for the free settlement of Italian nationals in His Majesty's Dominions. But the Commonwealth Government has recently eliminated any probability of friction by concluding with the Italian Government an agreement whereby Italy will issue passports to migrants for Australia only under agreed conditions.

Until the Great War, therefore, Australia was engaged in getting and keeping free from commercial obligations of a general kind. There has been no change since the peace settlement. Australia has not acceded to any of the numerous recent Imperial general commercial treaties. The policy of making agreements on specific matters calling for settlement has, however, been maintained; thus Australia has become a party to agreements with Norway (1924) concerning lunatics, and with Estonia and Portugal (1926) concerning tonnage certificates.

All these treaties are bi-lateral. But the same principles apply to the multi-lateral conventions by which international co-operation in many non-political matters has been secured. Provisions for separate dominion adherence and withdrawal have long been the rule. Either as an original signatory or by subsequent adherence, the Commonwealth is now a party to a number of such conventions, whose subject-matters range from posts, telegraphs and aerial navigation to customs formalities, animals with infectious diseases and the opium traffic. Some of them relate to matters outside the legislative competence of the Commonwealth, raising thereby a constitutional problem considered below.

Political Relations.—In the political sphere development, though of more recent date, has been similar and is well known. Suffice it to note here that Australia has adhered separately to recent Imperial Extradition treaties and has a separate right of denunciation; her representatives took part in the negotiation of the Washington treaties, by which she is bound; she has not adhered to the Locarno Treaty; she was an original signatory of the Peace Pact of Paris (1928).

Australia has not as yet negotiated any engagements in treaty form with foreign sovereigns. She has, however, made three distinct series of governmental accords. The first, beginning from 1904, provided that the education test under the immigration

Acts would not be administered to merchants, tourists, students and ministers of religion, natives of the signatory countries, provided that they held passports in proper form. Such persons might remain in Australia for a period of one year, in some cases renewable on application. These agreements were concluded in the first instance with Japan, India and China. Similar agreements have been made with Hong Kong, Annam, Siam, Straits Settlements, Burma, Ceylon, Egypt, the Philippines and the Hawaiian Islands. The second series of agreements was made in 1924-5 with Southern European governments, for the restriction of immigration. The Governments of Greece, Albania, Czecho-Slovakia, Yugoslavia and Malta agreed not to issue passports to their nationals, except within an agreed monthly number. The agreement with Italy has already been referred to. Thirdly, there are the trade "treaties" with Canada, South Africa and New Zealand.

Membership of the League of Nations.—Australia's position as a distinct member of the League of Nations scarcely calls for comment here. Perhaps its most significant incident is her rights and duties as a "C" class mandatory. She has not, like South Africa, disputed the point of sovereignty with the Permanent Mandates Commission. But it may be recorded that in 1927 she ranged herself beside the Imperial Government in contending that the supervisory functions of the League relate not to the administration as a whole, but simply to the execution of the provisions designed to protect the natives. It is unlikely, however, that the Commonwealth will decline to supply information upon matters which it deems outside these functions. Relations between the Commonwealth and the Commission are stated to have been cordial, and the Commonwealth has apparently supplied in the past all the information now requested in the League's amended questionnaire.

Membership of the International Labour Organization.—Australia's membership of the International Labour Organization raises other problems. The subjects with respect to which the Federal Parliament may make laws include external affairs, overseas and inter-state commerce, shipping, postal, telegraph and like services, trade marks, copyrights and patents. But there is no provision in the Constitution giving to the Commonwealth express powers to make laws for implementing treaties. Treaties whose subject-matters fall within the legislative competence of the States alone have, therefore, presented considerable difficulties in Australia. The Commonwealth has several times been in the dilemma

either of postponing its adherence until the concurrence of all the States could be obtained, or of notifying an adherence in respect of some States only. Neither alternative is satisfactory. On the one hand, state opposition may make adherence impossible—as seemingly in the case of the Berne Convention (1906) prohibiting night work for women in industry. On the other, nation-wide action is commonly indispensable—as with the Air Convention (1919). The difficulty would be acute in the case of many of the draft conventions of the International Labour Organization. Its constitution, however, affords an avenue of escape by providing (Art. 405) that a federal State may in its discretion treat a draft convention, in respect of which its powers are limited, as a “recommendation” merely. In that event it will forward the draft convention to the State Governments and report to the League what action, if any, they are taking. The Commonwealth has been in the habit of exercising this discretion. Its only duty is, therefore, to supply information of state action, and this duty seems to have been satisfactorily performed.

In respect of conventions within Commonwealth competence, however—conventions concerning shipping are the only examples to date—the Commonwealth's obligations are precisely those of a unitary State. The Commonwealth has not been very diligent in their performance. It would probably make no appreciable difference to Australian industry if the nine draft conventions, which fall at least in part within its competence, were put into immediate operation. But only one already covered by legislation has so far been ratified—the convention for the establishment of facilities for finding employment for seamen (1920). Three more await minor amendments of the Navigation Act: the Commonwealth's view is that legislative provision should precede ratification. The remainder are officially stated to be “under consideration.”

COMPARATIVE CIVIL LAW IN THE UNIVERSITIES.

[Contributed by PROFESSOR J. EGGEN VAN TERLAN, LL.D., Bonn.¹]

Reform of Legal Education.—Since the war it has become clear in all countries that there must be a reform of legal education and that the teaching of law in the universities must be adapted to the requirements of modern life. International relations have become so numerous and important as to render the training of lawyers a primary concern.

In the countries of Central and Western Europe there is a general movement not confined to persons specially interested in higher education but extending to judges, barristers and politicians to bring the teaching of law into accord with the necessities of life and to see that there are courses of lectures on those subjects which possess the greatest educational value. Programmes of reform have been elaborated since the war in several countries. One main object of these reforms has been, by increasing the difficulty of the legal curriculum, to check the formidable overcrowding of the profession.² Another object has been to satisfy the desire felt in the various states to give a better professional education to future administrators and judges.

¹ Translated by the Editor.

² In Prussia there are at the present time 12,500 law students compared with 6,000 in 1913. France had before the war 17,000 law students. This great influx in Germany is due mainly to the fact that the young men who were formerly destined for the military career have been diverted into law. (Cf. A. Pinner, *Die Anwaltschaft in Gegenwart und Zukunft*, Deutsche Juristenzeitung, 1928, p. 22). It is matter of common knowledge that the profession of an advocate has never enjoyed in Germany the same prestige as in England or in France. Advocates (*Rechtsanwälte*) in Germany are at the same time solicitors. They are not subject to a rigid discipline, such as that of the French *Ordre des Avocats*, and there are no such established traditions of the Bar as exist in the countries of Western Europe. Their influence upon politics and legislation is negligible, and their attitude to the judges is one of subordination.

The German Code of Civil Procedure, as we know, particularly since the revision of 1924, gives the judge very great control over the procedure to be followed in the case, a control which appears to me so extensive as to endanger the freedom of defence and the rights of parties.

It is no part of my intention to enter here upon any discussion, however brief, of the reform of legal studies. This is by no means because I think that everything has been said in the flood of literature poured out on this subject. As a matter of fact this literature consists largely of repetitions. But without doubt the question is in a high degree complicated and delicate and hardly two persons can be brought to agree upon it.

In this short article I desire to explain quite simply why, in my opinion, it is necessary to have at least one course devoted to comparative law—and it would be natural to begin with a course of comparative *civil* law—and why perhaps such a course might be made obligatory for our future doctors and licentiates in law.

History of Comparative Law.—In France the usefulness of comparative law has been realized for a long time, and for a generation or more comparative law has been included among the branches of legal education, but in other countries before the war this was not the case. At the present time, however, we see on all hands, and particularly in Germany, a great awakening of interest in foreign laws and institutions, and it is of this that I desire to speak at greater length. Comparative law is the *cadette* among the branches of legal study. It was born yesterday, so to speak, and, as Sir Frederick Pollock has said, "Men actually living have seen its birth." Its history, as a separate science, has been sketched by the distinguished professor of comparative law in Paris, M. H. Lévy-Ullmann in a remarkable article which appeared in 1923 in the *Revue de Droit* of Quebec.¹

The science may be considered as having been born in 1869, which was the date of the foundation of that Société Française de Législation Comparée which has done so much for comparative law, and it has gone through three marked periods in its existence. In the first period, which lasted till 1900, comparative law was first and foremost practical. It aimed at being useful to business men and lawyers who had to deal with matters involving questions of private international law or of a foreign law. The end of this period is marked by the first, and so far the only, International Congress of Comparative Legislation.² At that Congress reports of the greatest value were presented by the masters of juridical science at that time: Saleilles, Esmein, Thaller, Lambert, P. Pic, Lyon-Caen,

¹ "De l'Utilité des Études Comparatives," *Revue de Droit*, Québec, 1923, pp. 385-98.

² The question of holding a second International Congress in Geneva in 1931 is under discussion.

Josserand, Lainé, A. Weiss, Lévy-Ullmann, Jitta, Sohm, Kahn, Crome, etc. The effect of their labours was that a new orientation was given to the subject. The interest shifted to the improvement of legislation. The idea was conceived that in those European countries which had arrived on parallel lines at much the same stage of development it might be possible to arrive at a certain measure of legislative uniformity—a *droit commun législatif*—as it was happily expressed by Professor Lambert of Lyons. This conception dominates the studies of comparative law between 1900 and 1914.

In the third epoch, the period of the war, the passions of the combatants were too strong to permit the survival of this ideal. In its place we find the thesis of a legislative alliance among the allied nations a proposal set forth by M. V. Scialoja in the *Nuova Antologia*.¹

Several international committees were formed and meetings were held up to 1919, at which Belgium, Canada, Greece and Rumania were officially represented. The fruit of these meetings was the Draft Code of Obligations for France and Italy.²

M. Lévy-Ullmann concludes his article by a description of the aims of comparative law : “ In the technical order of ideas comparative law must widen the field of its analytical investigations and must perfect its juridical synthesis and at the same time in the wider domain of civilization in general, of which comparative law is one of the vital factors, it must work for the realization of the ideal of universal peace.” He adds in a note that his article is to be followed by an exposition of the method of comparative law and by a sketch of the varied organizations which might be turned to account to enable the study of comparative law to attain its ends. For my part, I shall confine myself to indicating the advance which has been made in the principal countries towards giving comparative law the place which it deserves in university studies. Nothing is more interesting than to see how much has been done in this way, especially in Germany.

Comparative Law in Germany.—This study of foreign countries and their institutions is a direct result of the teaching of the war, and one must admire the quickness and the method displayed by the Prussian Minister of Public Instruction, Professor D. C. F. Becker, who, as an old university professor, was fully acquainted with the needs and exigencies of modern higher education. To him belongs

¹ 1 févr. 1916,

² Paris, 1927.

the honour of having brought about the creation of those Institutes for the study of foreign affairs to which I drew attention recently in an article in the *Bulletin de législation comparée*.¹

The war suddenly made evident a fact which had up to then escaped notice, namely, the juridical isolation of Germany. Mr. H. Isay, a professor of a polytechnic school of Charlottenburg, has written on this subject in very severe terms, and, as his remarks throw much light on the subject, I shall take the liberty of summarizing them.²

According to Mr. Isay this isolation goes back to the date of the foundation of the Empire, and it may be said, without fear of being accused of exaggeration, that for a long period our handbooks and treatises on German Private Law ignored almost completely foreign legal literature and foreign laws.³ The same was true of the treatises on Public Law. Nay, even on the subject of Private International Law,⁴ in which there were writers—English, French and Italian—of such notable distinction, their works were ignored, and a well-known professor, E. Zitelmann, was able to publish in 1897 and 1913 two large volumes on Private International Law in which no use is made of any foreign work. From the scientific point of view such an attitude was completely unjustifiable, for, in France and in England, there are in this subject works which deserve to be placed in the front rank both for depth of thought and attractive presentation. Mr. Isay, by a rather bold metaphor, says German law is an illustration of inbreeding carried to the extreme (*das Bild reinster Inzucht*). When he examines the cause of this state of things he comes to the conclusion that it is not to be found in any peculiarity of law as such, but to the fact that German legal thought has separated itself from the juridical life of Western Europe.

As early as 1921 this lamentable state of things had been noticed by Professor Erik Kaufmann (of Bonn) in his book *Kritik der Neukantischen Rechtsphilosophie*, where he speaks of "the great breach between German thought and that of Western Europe and America upon all social problems." He attributes this breach to the Kantian philosophy and the historical school. Mr. Isay accepts Kaufmann's conclusion but refutes the contention that Kant and Savigny are responsible.

In his view, which I am much inclined to adopt, the cause

¹ 1928, pp. 256-257.

² *Die Isolierung des Deutschen Rechtsdenkens*, Berlin, 1924.

³ *Ibid.*, pp. 4, 5, 13 et seq.

⁴ *Ibid.*, p. 6.

must be sought for further back. It is to be found in the conception of the State elaborated in Prussia, the State which exercised an hegemony over the other German States, and played, as we know, such an important part in bringing about the national unity. The legal philosopher who had the greatest influence in the eighteenth century was Christian Wolf. In the eighth volume of his *Jus Naturae* Wolf formulated the scientific theory of the "Police State" (*Polizeistaat*). His model was undoubtedly the State of Frederick II, the sovereign to whom his work is dedicated.

Wolf regards the State as a sort of tutor or paternal master who rules his "subjects"—*Untertane*—rod in hand, and this conception, which Wolf found quite natural, has unfortunately quite dominated German thought. How far away all this is from Western ideas, and how completely foreign to Wolf's system are the notions of justice and of the self-determination of peoples! In the Western countries, on the other hand, a very different conception has prevailed of the rôle of the State. Even in the Middle Ages England had affirmed the dignity of the individual *vis-à-vis* of the State and had displayed an invincible sense of justice. These ideas were carried to America by the emigrants of the *Mayflower*. The English State, founded on the rights of the individual as well as on those of the State, is the first Constitutional State" (*Rechtsstaat*) to make its appearance. In France it was Montesquieu, in his *Esprit des Lois*, who first promulgated this political ideal, and legal expression was given to it in the Constitution of 1791, which was based on the American Bill of Rights, and on the Declaration of the Rights of Man of 1789.

Under the influence of the liberal ideas which prevailed in Germany till about the middle of the nineteenth century the separation between German ideas and those of the West remained latent, even in spite of the pernicious influence of Hegel with his doctrine that the State was all-powerful. It was only after the Empire was established that this opposition showed itself. In the enthusiasm created by having for the first time a National State in which the separate States were united, the desire was felt to create a Constitutional State with large executive powers, and these powers came to be overestimated. In this way the breach between German and Western ideas became wider and wider, particularly as to matters of private law and international law. The war suddenly made manifest the extent of this separation. The ignorance in Germany of English and French legal literature

produced unfortunate effects in practice and not merely in theory.¹ Mr. Isay gives this illustration: "All of us imagined with great *naïveté* that the Treaty of Versailles was going to be interpreted according to German conceptions and German methods. It was from this point of view that the first commentaries on the Treaty were written, and it was on these lines that the first cases before the Mixed Courts of Arbitration were presented. A considerable proportion of the cases which were lost might have been gained if our lawyers had been better equipped. We found out later that the best arguments were to be drawn from the French and English books, and when that knowledge had been gained the results became better."²

The views of Mr. Isay are confirmed by Professor Rabel of Berlin, a member of the Committee for the Codification of Private International Law, in a very striking article on the aims and the importance of comparative law. His conclusion is as follows: "The thing most necessary is that we should train a race of jurists able to understand the legal mentality of foreign countries. In concluding treaties or commercial agreements between States everything depends on understanding the point of view of the other side. We must not lose sight of the fact that it is precisely the Western nations which cling even more closely to their legal conceptions than we do. From the point of view of practical economic interest, next to political economy nothing is more important than the knowledge of foreign juridical science. It is indispensable that we should enter again into contact with the rest of the world and work together with the rest of the world. What would become of our chemistry or of our medicine if they took up a position of isolation?"³ Germany, then, has realized that if we are to find a remedy for this legal isolation we must set ourselves to study foreign laws and foreign legal mentality. The key of this knowledge is given by comparative law. It is true that comparative law found no place in the university programmes of the nineteenth century, but its omission at that time was of no great importance. In fact, before the German Civil Code of 1900 the Law Faculties studied the common private law of Germany, and this was in reality a study in comparative law. It involved the Roman law and the various laws of the several States, and, as we know, almost all Western Germany was ruled by the

¹ *Die Isolierung des Deutschen Rechtsdenkens*, 1924, pp. 15, 20.

² *Ibid.*, pp. 20 *et seq.*

³ "Aufgabe und Notwendigkeit der Rechtsvergleichung" (*Rheinische Zeitschrift für Zivilrecht u. Prozessrecht*, Mannheim, xvi, 1928).

French Civil Code. These conditions were altered by the introduction of the new Code and the dangers incidental to any codification were pointed out in 1893 by one of the pioneers of comparative law, Professor Édouard Lambert.¹ Speaking from experience of the Napoleonic codification and of its interpretation by the so-called exegetic school, Professor Lambert showed how dangerous codification might be to legal science if one did not introduce into the legal curriculum, by way of an antidote, the methodical study of comparative law. These warnings were repeated by Raymond Saleilles, who was pre-eminent among French jurists for his knowledge of German law, and did more than anybody to make it known abroad. Unfortunately, these warnings fell on deaf ears. Subsequent events have shown how well-founded they were.

At the present time, however, our Faculties of Law are displaying in regard to comparative law an activity which is truly remarkable.

As is generally known, the German system of legal education is closely similar to the French in this respect, that it recognizes two examinations quite distinct in character the one from the other. There is the practical examination before a state-jury for the title of Referendar or *Licencié en Droit* respectively, and the purely scientific examination before an university-jury in which the candidate must submit and support a thesis for the doctor's degree in law. Among the optional subjects upon which the candidate is examined *viva voce* (*colloquium*) we find private international law but not comparative civil law.²

Now, if there is any subject well fitted for training the legal mind, for widening the horizon of the young lawyer and for affording the best gymnastic, it is, undoubtedly, comparative civil law. The study of the contrasts and the resemblances between the Latin, German and Anglo-American systems is admirably adapted to bring out and make intelligible the fundamental principles of law. It is only the man who knows how to disengage these principles who deserves the name of a jurisconsult, for he alone will be able to point out the consequences which follow from the adoption of such

¹ *La Fonction du Droit Comparé*, t. 1: "Les Conceptions étroites ou unilatérales." Paris, 1903, pp. 94 *et seq.*

² *Promotionsordnung* of the Law Faculty of Bonn (7, al. 3). The method of teaching International Private Law in the German Universities is open to criticism. See my articles "Der Unterricht des Internationalen Privatrechts" (Leipzig. *Zeitschrift für Deutsches Recht, Blätter für internationalen Privatrecht*, IV, Jan. 1929) and "Die Bedeutung des International Privatrechts für den Richter" (*Deutsche Richterzeitung*), October 1929.

a reform and the reactions which it will produce on the legal position of individuals. For these reasons it seems to me to be essential that we should include comparative law among the subjects for the doctorate. It will help to form that race of jurists familiar with foreign law which Professor Rabel desiderates. To arrive at that juridical synthesis there is no better training than comparative law, unless it be private international law. We must develop in the student those faculties of judgment and intelligence which will enable him to work out his own conclusions, or we shall never form jurisconsults.

Nevertheless, it would be unjust not to recognize the numerous attempts that are being made in this direction by our professors of law. I have examined the programme of instruction for the winter semester 1928-9, and I find that in almost all the universities there are lectures, or practical exercises in seminars in foreign law or comparative law.¹ The exceptions are Freiburg, Giessen, Göttingen, Greifswald, Jena, Marburg and Rostock.

To complete the picture I ought to say that among the theses submitted for the degree of doctor of law in the various universities a large number deal with comparative law.

In conclusion, I should like particularly to draw attention to an excellent article by Mr. F. von Rauchhaupt of the University of Heidelberg concerning the study of contemporary foreign laws. Mr. von Rauchhaupt has a wide knowledge of Spanish and South American laws on which he has published a considerable number of works, and in 1927 he made a journey for scientific purposes to South America and lectured in several universities. He is a strong advocate of the study of comparative civil law, and expresses the wish to see "the creation of chairs of foreign law in connexion with the chairs and institutes of German law and particularly German legal history; the work of the new chairs being so arranged as to fit in with those subjects in the Faculty of Letters with which they have most in common."²

¹ *Minerva*, 1928. I find, e.g., in the programmes: Berlin, Seminary for Comparative Law (Rabel); Exercises in Comparative Law (M. Wolff); Institute for Foreign Law and Economics (Heymann); Bonn, Comparative Civil Law with exercises (Eggen); Seminary of Comparative Law (Schulz); Practical Work in Comparative Law (Doelle); Halle, Comparative Law (Ruth and R. Schmidt); Hamburg, Seminary for Foreign Law (Mendelsohn-Bartholdy); Heidelberg, Institute for Foreign Law (Gutzwiller and v. Rauchhaupt); Königsberg, Comparative Law (Schreiber); Leipzig, Institute for Political Knowledge of Foreign Countries (R. Schmidt, Langer); Munich, Institute of Comparative Law (Riessler).

² "Die Pflege der modernen Ausländischen Rechte" (*Zeitschrift für vergleichende Rechtswissenschaft*, XLIV, 1928, pp. 130-77).

Comparative Law in France.—I have spoken at some length of the present position of the study of comparative law in Germany, and I now hasten to pass to other countries. At the beginning of this article I mentioned that as early as 1890 there were created at Paris two chairs, one of civil law and the other of comparative civil law. These were followed in 1892 by chairs of commercial law and comparative commercial law, and in 1895 by chairs of constitutional law and comparative constitutional law. Subsequently, the subject of Comparative Law was taken up in other universities—Toulouse, Rennes and Lyons, and conferences on this subject were established at the École Libre des Sciences Politiques in the rue St. Guillaume.¹ In Paris, in addition to the seminar (*Salle de Travail de Droit Comparé*) in the Faculty of Law, there exist also the Centres de Documentation Législatives et Sociales both in the Faculty of Law and in the École Normale Supérieure. At Lyons we have the Institut de Droit Comparé under Professor Lambert,² and at Strassburg the Institut de Droit Comparé et d'Économie Comparée, which includes sections for German Law and the Law of Luxemburg, and also a section for the Slavonic countries and the Balkans.³

Comparative Law in Spain.—In Spain we have the Instituto Ibero-Americano de Derecho Comparado, founded by the eminent savant, Prof. R. Altamira y Creven.⁴

Comparative Law in Italy.—In Italy we have the Istituto di Studi Legislativi, which publishes the *Annuario di Diritto Comparato e di Studi Legislativi*. In the Italian universities there exist some optional courses in Comparative Civil Law, but that subject is nowhere obligatory for the degree, as is the case with private international law.⁵

¹ A. Esmein, "Le Droit Comparé et l'enseignement du droit" (*Congrès International de Droit Comparé*, 1, pp. 445 et seq.).

² *L'Institut de Droit Comparé—Son Programme, Ses Méthodes d'Enseignement* (Lyon, 1921).

³ An inter-university convention between France and Luxemburg provides for the constitution of a mixed commission for the purpose of facilitating in every way exchanges of professors and students between France and Luxemburg. The doctorate of Luxemburg is equivalent to the French *licence*, and entitles the holder to become a candidate for the doctorate in law.

⁴ Judge of the Permanent Court of International Justice and member of the International Academy of Comparative Law. The Instituto Ibero-Americano has so far published seven volumes, which are well worthy of notice. On the subject of the institutions of comparative law in Europe see the review of Professor Rabel, 1927, pp. 489, 882, where a complete enumeration of them may be found.

⁵ I refer to the programme of the Faculty of Law at Padua, 1927-8. Cf. J. Radonaut, "L'Organisation des études juridiques dans les Universités italiennes" (*Revue Internationale de l'Enseignement*, LXXVI, 1922, Paris, p. 205).

Comparative Law in Holland.—In Holland the system of higher education was reorganized by the royal decree of June 15, 1921, modifying Articles 131, 137 and 141 of the Law concerning higher education. This law contains no mention of comparative law, but it creates a system of legal instruction of a somewhat anomalous character. With the approval of the Faculties courses may be given in various laws in addition to those in modern Dutch law. Thus, instruction may be given in Roman law, old Dutch law, old French law, canon law, English law, or the Adat law of the Dutch East Indies. In any such course of instruction the law in question must be studied historically and compared with the Dutch law. I may mention that in Holland the master's degree in law (*Meester in de Rechten*) which qualifies the holder to become an advocate or a judge does not require the submission of a thesis which is necessary for the doctor's degree.¹

Comparative Law in Belgium.—In Belgium also there has been, if not a complete reorganization, at any rate a serious modification, of the university system as regards degrees and examinations. So far as the Faculty of Law is concerned the courses have been made more thorough, and after long delay it has been decided to introduce practical exercises analogous to those which produced such notable results in the Faculty of Philosophy and Letters. In the examination for the doctor's degree in law four optional courses have been added, the total number of courses being now eight, and comparative civil law is one of these optional courses. This is a sound reform so far as it goes, but it is to be regretted that it has not been carried further in the direction indicated by the *Ordre des Avocats* of Brussels in their report of 1895.²

The result of my inquiry into the subject is, I think, to show a widespread desire that legal education should be more than a narrow professional training. We must give our young lawyers such an equipment as will fit them to advance the science of law, and in order to achieve this end no better method exists than the study of comparative law.

¹ H. J. Smidt, *Het academisch Statuut* (Alphen, a/R 1922).

² *L'Enseignement du droit et le stage; Rapport de la Commission du Conseil de l'Ordre des Avocats à la Cour d'Appel de Bruxelles* (Bruxelles, 1895). Cf. L. Leclercq, "L'Enseignement Supérieur en Belgique: Deux Projets de Loi" (*Revue Internationale de l'Enseignement*, Paris, LXXVIII, 1924, p. 306); *Documents Parlementaires Belges, Chambre des Représ.*, 1924-5, N. 145, Session 1927-8, N. 102—*Sénat, Sess.*, 1923-4, N. 97.

PRINCIPAL CHARACTERISTICS OF LEGAL POLICY IN THE RECENT EUROPEAN DRAFTS OF PENAL CODES: A COMPARATIVE STUDY.

[Contributed by DR. JUR. KURT JUNCKERSTORFF, *Berlin.*]

Individualization of Criminal Legislation.—The modern trend of criminal law is dominated by the *individualization* of criminal legislation. The rigid scheme of the old codes is to be abandoned, so far as compatible with legal policy, and the criminal act is to be considered not by itself alone, but also from the standpoint of the law-breaker. The opportunity should be taken, while judging the crime, to consider not only the circumstances under which the act took place, but also to allow for the personality of the defendant. In other words, as far as possible under our present form of legislation, a means is to be provided for the realization of the ideal of every criminal code, which is that the defendant may obtain justice. Our desire is not solely to punish the malefactor ; we wish also to improve him and, if there is any possibility, to make him a useful member of society.

The modern tendency of European criminal legislation as it is expressed particularly in the German, Czechoslovakian and Swiss legislative drafts, is not, however, intended to endanger or surrender the public interest in the attainment of this great goal. This position is the logical consequence of the fundamental viewpoint of criminology with regard to this very problem of criminal legislation, as described briefly above. During the evolution from the rigid standards to an elastic system, the State is under an obligation to observe carefully the experiment which is in progress. It is only an experiment because thus far there are no conclusive results clearly indicating the way to be taken. Furthermore, the European criminal laws show, in their broad outline, the increasing consciousness that it is not solely the State's duty to punish crime in each individual case, but that it is one of her most noble duties to prevent altogether the commission of crime, as, for instance, by means of physical restraint of the individual if necessary.

The German, Czechoslovakian and Swiss drafts seek to attain this object in three different ways. In the first place, they seek to give the criminal law the necessary elasticity by elaborating, when desirable, upon its various formulated rules. Secondly, they endeavour to broaden considerably the field of judicial discretion in order to give as much flexibility as possible and thereby allow for the peculiarities of the individual case. This liberty is generally limited by the prescribed rules regarding the forms of punishment. At the same time, there is a desire not to leave too much to judicial discretion, so as to ensure uniform practice as nearly as possible, and avoid danger to sound legal policy. Thirdly, institutions specially adapted to the individuality of the defendant will serve for his segregation and improvement.

Doctrine of Responsibility.—The special elaboration upon the formulated rules of the criminal law finds its most marked expression in the introduction of the doctrine of responsibility. Like the criminal codes of all civilized countries, the German, Czechoslovakian and Swiss criminal law drafts provide that the degree of responsibility is one of the elements governing punishment. Whereas, the existing law generally recognizes only the extremes of mental states, *i.e.* responsibility and irresponsibility, the modern European theories of criminal law now demand an extension of that doctrine, in view of the fact that in many cases neither of the extremes can be ascertained. The application of the rigid system of the present law to the facts of a case leads to unjustified severity on the one hand, or leniency on the other. This results when one in this middle stratum of so-called lessened responsibility is decided to be fully responsible or irresponsible. While the framers of the three drafts under consideration have given this matter a great deal of attention, they have further become convinced of the practical difficulty presented in ascertaining the state of mind in question, not to mention the problems which arise in reducing this postulate to a rigid form.

These difficulties induced the draftsmen of the Czechoslovakian draft to avoid introducing the term "lessened responsibility" into the rules of criminal law, while the German and Swiss drafts have given it a trial. This different attitude of the Czechoslovakian draft is merely of theoretical importance. Practically the drafts have a uniform basis, inasmuch as a more lenient punishment has been provided in the former cases in which the responsibility was lessened at the time of the

crime.¹ The reduction in punishment is placed at the discretion of the Court by special regulations in the Swiss draft,² and under the general provisions as to punishment in the German³ and Czechoslovakian.⁴

A legal distinction between the causes of lessened responsibility is found only in the Czechoslovakian draft, which unequivocally provides that no leniency in the form of punishment shall be granted in cases in which the mental state in question has been caused by alcoholism through the criminal's own fault. In conclusion we can state from this example that, while a more thorough treatment of the problems may be desirable, the framers of the drafts are anxious to elaborate upon the fixed rules of criminal law.

Fixing of Punishment.—The chief object of these criminal laws may be observed particularly, as stated above, in the provisions of the three drafts regarding the fixing of punishment. While the German draft⁵ defines with particular clarity the limits within which the punishment is to be fixed, these limits are also shown in the paragraphs of the Czechoslovakian⁶ and Swiss⁷ drafts. According to the German (which permits waiving punishment altogether in certain cases),⁸ the Court in fixing the punishment shall particularly consider how far the act was caused by the malicious mind or will of the culprit, and how far it originated from causes for which the defendant cannot be blamed. It shall take into consideration: “. . . the motives of and incentives to the deed, the object which the criminal pursued, the premeditation required for the deed and the means employed; the consequences of the deed, the measure of responsibility of the criminal and the influence of sickness or similar disturbances upon his will; the life of the criminal, his personal and economic condition at the time of the deed and the trial, his conduct after the deed, and particularly whether he has tried to make restitution for the damage.”

The basis here laid for modern criminal laws is undoubtedly suitable to be the foundation for the desired reform of the entire criminal system. On the other hand, we must not overlook the dangers which lurk in too great an extension of the idea of individualization, nor forget that it is important to maintain the golden mean.

¹ Under all three codes the responsibility is determined by the biological-psychological method.

² Art. 15.

³ S. 64 *et seq.*

⁴ S. 77.

⁵ Art. 60 *et seq.*

⁶ Arts. 11, 63.

⁷ S. 69 *et seq.*

⁸ Cf. s. 40 *et seq.*

Above all, when collating the facts of the crime, we must avoid creating an impression of indecision as to the surrounding circumstances, amid the multitude of these new considerations. Thus, not only is the responsibility of the judge increased to an unbearable degree, but also the danger is apparent that, in the desire to give justice to the defendant, the interests of the State and public may be subordinated. From this standpoint the German draft particularly seems to harbour considerable danger. This criticism applies, in some degree, to the Czechoslovakian draft, and, to a lesser extent, to the Swiss.

Segregation and Improvement.—It is very commendable that the three drafts have not overlooked the doctrine of segregation and improvement. In the first place, they wish to employ the method of conditional punishment of the sane criminal for lesser crimes.¹ In more serious crimes it is necessary to have protective oversight, as required by the German and Swiss drafts,² but not by the Czechoslovakian. Special confinement is required for the habitual criminal in accordance with the doctrine of public protection discussed above.³ All three drafts contain provisions regarding the education of delinquent persons criminally inclined, but differ in that the Czechoslovakian and Swiss⁴ propose to use this in almost all cases where the crime is caused by the vagrancy of the defendant, while the German⁵ reserves this means for certain kinds of transgressions. The German and Czechoslovakian drafts⁶ provide that those acquitted because of irresponsibility, whether insane, abnormal or pathological, shall be confined to a sanatorium as long as required by public safety. The German draft extends this treatment to cases in which a person of lessened responsibility has been sentenced. According to the Czechoslovakian draft, persons are to be sent to such places if they have committed crimes caused by uncontrolled inclinations to use alcoholic beverages, other intoxicating concoctions, or poisons.⁷ While, under the provisions of the Czechoslovakian draft, it is generally immaterial whether or not the act was

¹ German draft, s. 40 *et seq.*; Czechoslovakian draft, s. 37 *et seq.*; Swiss draft, Art. 39 *et seq.*

² German draft, s. 61; Swiss draft, Art. 44.

³ German draft, s. 59 ("Sicherungsverwahrung"); Czechoslovakian draft, s. 58 ("Verweisung in eine Verwahranstalt"); Swiss draft, Art. 40 ("Verwahrung von Gewohnheitsverbrechern").

⁴ Czechoslovakian draft, s. 53 (1); Swiss draft, Art. 41.

⁵ S. 58. It is reserved for the cases of ss. 370-71 (Vagrancy, etc.).

⁶ German draft, s. 56; Czechoslovakian draft, s. 54 ("Verweisung in eine Anstalt für kranke Gefangene.")

⁷ S. 54 (2).

done while intoxicated, the German draft ¹ requires that the act must have been done while the defendant was intoxicated in order that he may be committed to a *Trinkerheilanstalt*, a place for the cure of drunkards, or to any similar place. In the interest of the battle against the abuse of alcohol, and against intoxication by alcohol or narcotics, this restriction is regrettable. The Swiss draft ² provides only for separate treatment of the habitual drunkard, and requires some connexion between the alcoholism and the act. In such cases, this draft permits of sending the defendant to a *Trinkerheilanstalt*.

Police Jurisdiction.—Although it is very pleasing, on the one hand, to view the uniformity of the three drafts regarding the provisions for the segregation and improvement of the criminal, nevertheless one cannot but regret the disregard of the sound, scientific policy which requires a separation of criminal jurisdiction proper from police jurisdiction. Here the German draft undoubtedly shows the most glaring faults. True, it has superficially maintained the separation—as it is there called—between the criminal law itself and those minor breaches of the law which do not make the offender liable to imprisonment. In fact, however, the second book, called the *Buch der Übertretungen*,³ on the law of offences punishable by fine only, is so faulty in its development that we can only consider it a partial fulfilment of this requirement. The deficiency in the German draft is the more regrettable, because there was a possibility that the demand for the establishment of a uniform police law might have been fulfilled. This might well have been found in this second book, and thus have marked a most important step toward uniformity of the police system and police law. The Swiss draft has treated the police jurisdiction more thoroughly. True, the Swiss falls far below the standard which must be maintained as essential to the preparation of an effective, coherent organization and development of the subject-matter. Only the Czechoslovakian draft meets this minimum standard as to structure and arrangement. Although in many cases the arrangement and definition of the different crimes is open to criticism, nevertheless a sound foundation is here laid, which will assist in reaching the great goal of modern criminal jurisprudence.

¹ S. 17.

² Art. 42.

³ There is no precise equivalent in English criminal law to *Übertretungen*.

THE STATUTE LAW OF NEW ZEALAND SPECIALLY APPLICABLE TO WOMEN AND CHILDREN.

[Contributed by JAMES CHRISTIE, ESQ., LL.M., *Parliamentary Law Draftsman.*]

My purpose in the present article has been to indicate the general trend and nature of the legislation, in so far as it specially affects women and children, rather than to supply an exact or exhaustive statement of the law. The present form of the law in no case dates further back than 1908, and much of it has had its origin since that date. Some of it, however, has been in force for a much longer period; the first Adoption of Children Act, for example, was passed in 1881; and the first Act for the legitimation of children *per subsequens matrimonium* was passed in 1894.

The classification under the headings (a) Economic, (b) Domestic Relations, (c) Judicial, (d) Guardianship and Custody of Infants, (e) Women in Parliament and (f) Property, though not exact, provides a convenient means of correlating the somewhat diverse subject-matters dealt with.

Economic. (i) *Widows' Pensions.*—The so-called "widows' pensions" are never granted on the ground of widowhood alone, but the joint grounds of widowhood and of liability to provide for the support of dependent children must be present in all cases. The first "Widows' Pensions Act" was passed in 1911; and the scheme for the granting of pensions to widows with dependent children has been in operation since the beginning of the following year. On March 31, 1913 (that is, at the end of the first complete financial year) there were 1,313 widows' pensions in force; on March 31, 1928, there were 4,098, of an annual value of £307,865; in the financial year ended on that date the sum of £304,066 was actually paid out of the Consolidated Fund under the scheme.

Widows' Pensions are computed at the rate of 10s. a week for every child of the applicant under fifteen years of age and dependent on her for maintenance, with an additional sum of 10s. a week; but not so as to exceed an aggregate of £4 a week in any case; the

pension is further limited by reference to the income of the recipient derived from other sources. In no case is a pension granted of such an amount that the weekly income from all sources (inclusive of pension but exclusive of certain specified receipts, as, for example, benefits received from friendly societies or from the National Provident Fund) will exceed £5 10s. Stepchildren and children who, though born out of wedlock, have been legitimated by the subsequent marriage of their parents, are taken into account in determining the amount of pension payable in any case. As the pension is intended for the benefit of children rather than of adults, authority is given to the Commissioner of Pensions, in the event of the death of a pensioner, to pay to the *de facto* guardian of her children the allowance formerly received by their mother on their account.

(ii) *Family Allowances*.—Under the scheme of “family allowances” provided for by the Family Allowances Act, 1926, parents of more than two children are assisted from the Consolidated Fund in providing for their maintenance. Application for an allowance under the Act must be made by the father, but, save in exceptional cases, allowances under the Act are made payable to the mother, who is under a statutory obligation to expend the allowance exclusively for the benefit of the child or children in respect of whom it is paid. The rate of allowance is fixed at 2s. a week for every child in excess of two. The payment of allowances is limited not only by reference to the number of the children of the applicant, but also by reference to his income (including any separate income that his wife or children may have in their own right). An allowance is not payable in any case of such an amount that the total weekly income of the applicant from all sources, inclusive of the allowance, will exceed £4, plus 2s. in respect of each child in excess of two.

The scheme has been in operation for one complete financial year only (from April 1, 1927, to March 31, 1928); as at March 31, 1928, over 3,000 families were in receipt of allowances of an annual value of £46,557 in respect of about 10,000 children; as allowances are payable only in respect of the number of children in a family in excess of two, the 3,000 families represented a total of about 16,000 children. During the year the sum of £37,652 was paid. It may be anticipated, however, that, as more publicity is given to the scheme, it will be availed of to a much greater extent by persons entitled to benefit under it. Statistics compiled for other

purposes go to show that the annual requirement from the Consolidated Fund will be in the vicinity of £100,000.

It is to be noticed that both under the Family Allowances Act and the Act providing for widows' pensions (referred to in the preceding section) women and children of the Native race benefit to the same extent as those of European origin.

(iii) *War Pensions*.—As at March 31, 1928, there were 650 widows (without children) and 719 widows (with 1,105 children) in receipt of war pensions; the average annual pension was (i) in the case of widows without children £89, and (ii) in the case of widows with children, £154. The aggregate annual values of pensions for both classes were £57,528 and £110,799 respectively.

(iv) *Maintenance Orders*.—Under the Destitute Persons Act, 1910, on complaint made by a wife that her husband has failed, or intends to fail to provide her with adequate maintenance, a Magistrate has authority to make a maintenance order against the husband, directing him to pay a reasonable amount, to be fixed by the Magistrate,¹ towards the future maintenance of his wife. So also a maintenance order may be made against a wife in the interests of her husband, or may be made in the interests of a child under sixteen years of age against its parents or either of its parents. For the purposes of the Act, the term "parent" is not limited to relationship by blood, but includes relationship by marriage and adoption.

(v) *Testators' Family Maintenance*.—A discussion of the Act that empowers the Supreme Court to modify the will of a testator who has failed to make adequate provision therein for the maintenance of his dependents is not strictly relevant to the subject-matter of this article, for the Court has the same authority to modify the will of a woman who has failed to make adequate provision for the proper maintenance of her husband or children as it has in the case of a man who has failed to provide for his widow or children. In practice, however, the Act is principally used in cases where a male testator has failed to provide in his will for the maintenance of his widow or children.

The extent of the Court's power to modify the terms of a testator's will is not defined by the statute; it is settled, however, that the statute does not empower the Court to make a new will for a testator, but merely to modify a will where there has been a manifest breach on the part of the testator of "that moral duty

¹ Originally the Act fixed a maximum of £3 a week, but this limitation has since been removed.

which a just but not a loving husband or father owes towards his wife or towards his children, as the case may be" (*per* Edwards J., in *In re Allardice*, 29 N.Z.L.R. 959). What is an "adequate provision" in any case is a question that depends upon all the circumstances, including, for example, the station in life of the parties.

The settled principles upon which the Court acts in dealing with applications under the statute were set out at length in an article by the present writer published in the *Journal of Comparative Legislation* in 1918¹; since then the only substantial alteration of the law has been in the matter of the time within which applications for relief may be made. The general rule is that application for relief must be made within twelve months after the grant of probate of the will complained of, but in 1921 the Court was given power to extend this period, and in its discretion to receive and deal with any application for relief made at any time before the final distribution of the estate to which it relates.

Domestic Relationships. (i) *Marriage*.—The Deceased Wife's Sister Marriage Act, passed by the New Zealand Parliament in 1880, legalized the marriage of a man with the sister of his deceased wife and at the same time validated all such marriages theretofore contracted, except in cases where one or both of the parties had since lawfully intermarried with any other person. It was not until 1900, however, that a complementary Act was passed, making like provisions with respect to the marriage of a woman with the brother of her deceased husband. In 1908, further legislation was passed validating any marriages then subsisting between a man and his deceased wife's niece, or a woman and her deceased husband's nephew, but this later legislation did not extend to legalize future marriages contracted within the same prohibited limits.

(ii) *Divorce and Judicial Separation*.—Under the Divorce and Matrimonial Causes Act, 1928, a decree for judicial separation may be made by the Supreme Court on petition presented either by a wife or a husband on the ground of adultery, or cruelty, or desertion, without cause for not less than two years, or failure to comply with a decree for restitution of conjugal rights. Similarly, the Court may, on petition, grant a decree of divorce on any one of several grounds including, *inter alia*, adultery; desertion for three years or upwards; separation by mutual consent for three years or upwards; habitual drunkenness coupled with cruelty, or neglect

¹ New Series, No. XLI.

of duties ; unsoundness of mind extending over a period of seven years and from which the respondent is not likely to recover.

In any proceedings for divorce, nullity of marriage or judicial separation, the Court may make such provision as it thinks just with respect to the custody, maintenance and education of any children of the marriage. Similarly the Court may require the husband, party to any proceedings as aforesaid, to make provision for the future maintenance of his wife. In the provisions both as to custody of children and maintenance of wife the law follows the corresponding provisions of the law of England as enacted in the Supreme Court of Judicature (Consolidation) Act, 1925.

(iii) *Separation Orders*.—A “separation order” (to be distinguished from an order of judicial separation) is an order made by a stipendiary magistrate under the authority of Part III of the Destitute Persons Act, 1910, in favour of a married woman, to the effect that she be no longer bound to cohabit with her husband. On the making of a separation order the magistrate has jurisdiction at the same time to make a “guardianship order,” committing to the mother the legal guardianship of the children of the marriage while under the age of sixteen years. The provisions of the Destitute Persons Act as to guardianship of infants must be read together with the Guardianship of Infants Act, 1926, which enacts in New Zealand the law of England as contained in the Guardianship of Infants Act, 1925 (Imperial).

A separation order or guardianship order may be made against a husband or father on any of the following grounds : (1) wilful failure to provide adequate maintenance ; (2) persistent cruelty to wife or children ; (3) habitual drunkenness ; (4) conviction followed by fine or imprisonment, for assault or other offence of violence against wife or child.

(iv) *Adoption of Children*.—A system of legal adoption has been operative in New Zealand since 1881. The present law on the matter is contained in Part III of the Infants Act, 1908. Jurisdiction to make orders of adoption is exercisable by Stipendiary Magistrates ; the effect of an order of adoption is to confer on the adopted child the name of the adopting parent and (subject to certain exceptions of minor practical importance) further to confer and impose on the adopted child all legal and equitable liabilities, rights, benefits, privileges and consequences incident to the natural relationship of parent and child. Unmarried persons are competent to apply for adoption orders, but in such cases stringent restrictions

are placed upon the adoption of children by persons of the opposite sex. The most usual case is where husband and wife join in an application ; where application is made by a husband or wife only, the consent of the other party to the marriage is required. An order of adoption cannot be made in respect of a child after he or she has attained the age of fifteen years ; and, in the case of a child over twelve years of age, can be made only with the consent of the child.

Except with the special consent of the Court making an adoption order, an adopting parent is prohibited from receiving any premium or other consideration on account of the adopted child.

(v) *Affiliation*.—The law as to “ Affiliation Orders ” is to be found in Part II of the Destitute Persons Act, 1910. Proceedings for the making of an Affiliation Order in respect of a child are initiated by complaint on oath, made either by the mother of the child or by any reputable person other than the mother. The general rule is that the complaint must be made within six years after the birth of the child to which the proceedings relate, but the stringency of this rule can be relaxed in certain circumstances (as, for example, where the alleged father has supported or contributed to the support of the child).

Where complaint is made by the mother she is required to allege merely that the person named in that behalf is the father of her child ; where complaint is made by a person other than the mother, the complainant must also allege that the person named as the father of the child has failed or intends to fail to provide for its adequate maintenance. On the making of the complaint, a summons is issued requiring the person alleged to be the father to show cause why an affiliation order should not be made against him. A complaint may be heard only by a stipendiary magistrate who, if satisfied as to the truth of the complaint, is empowered to make an affiliation order “ adjudging the defendant to be the father of the child.” Provision is also made for the making of an affiliation order in respect of an unborn child, but in this case the prospective mother is the only person competent to initiate the proceedings.

The making of an affiliation order does not affect in any way the status of the child, its sole purpose being to provide for the proper maintenance of the child until it has attained the age of sixteen years. The maximum rate of payment is fixed at 21s. a week. In addition to the weekly payments above referred to, an affiliation order may require the defendant to make such payment

as may be prescribed in the order on account of (a) the expenses incidental to the birth of the child ; (b) the past maintenance of the child (up to an amount not exceeding £50) ; (c) if the child has died, the expenses incidental to its funeral.

(vi) *Legitimation*.—The subsequent marriage of the parents of a child born out of wedlock does not in itself operate to legitimate the child ; in addition the law requires an acknowledgment of paternity by the father, in the form of a statutory declaration, filed with the Registrar of Births. If the father of a child dies without having availed himself and the child of the benefit of the Act, the widow may take the necessary steps to legitimate her child.

The first Act of the New Zealand Parliament to deal with the subject of legitimation (the Legitimation Act, 1894) contained a provision depriving of the benefits of the Act children at the time of whose birth there existed a legal impediment to the intermarriage of their parents. This provision prevented legitimation in all cases where one or both of the parents was married at the time of their child's birth, and this limitation was not removed until the passing of an amending Act in 1921.

Judicial. (i) *The Child Welfare Act*.—The Child Welfare Act deals with two distinct classes of children, namely, indigent children and delinquent children. Indigent children are committed to the particular care of the State in cases where there is no person responsible in law for their maintenance, and at the same time competent to maintain them. Delinquent children are committed to the care of the State, because of their criminal or otherwise anti-social tendencies or actions, and the inability of their parents or other guardians to control and train them. The policy of the Government is to keep these classes apart, so that the misfortune of poverty shall not entail acquaintanceship with vice or crime. So far as practicable, all normal children, wards of the State, are placed in suitable private homes where they are maintained, at the expense of the Government, as members of the family in which they are placed ; these homes are regularly visited by State officials charged with the care of these children.

The practice of maintaining children in institutions has been reduced to a minimum ; it is resorted to now only in cases of emergency (until satisfactory arrangements for " boarding-out " can be made), and in cases of children with depraved, vicious or criminal tendencies or habits.

The Act establishes Children's Courts, with jurisdiction to

dispose of all judicial proceedings arising out of offences committed by children, or otherwise relating primarily to children. All applications for the committal of children to the care of the State are also dealt with by the Children's Courts. Children's Courts have extraordinarily wide discretionary powers, and their true objective is the training of the children who appear before them to become useful and happy members of the community, rather than to enforce by punishment the majesty of the law. The innovation has not been made without arousing adverse criticism, not only from members of the general public, but also from some of the officials appointed to administer the law. The view taken by the supporters of the system is that every effort must be made for the sake of the child, and that his social "adjustment" is the one thing to be accomplished at whatever inconvenience or cost; on the other hand, the critics say that boys and girls who misbehave and commit legal offences against the rights of others with respect to person or property must be taught another lesson, and that judicial punishment is a necessary incident of their instruction.

(ii) *Reformatory Institutions*.—By the Reformatory Institutions Act, 1909, as extended by an amending Act of 1918, provision is made for the detention in a Reformatory Home, for terms not exceeding two years, of women or of girls over the age of fourteen years, who have been convicted of certain offences (involving immorality or drunkenness or dishonesty). Reformatory Homes are either State institutions (where the objective is reformation rather than punishment) or private institutions (as, for example, institutions conducted by the Salvation Army or other religious or charitable organizations). The State Reformatory Homes are conducted on practically the same lines as are Borstal institutions for male offenders.

(iii) *Justices of the Peace*.—The disability which prevented women from holding office as Justices of the Peace was removed by statute in 1926, and since that date a considerable number of appointments has been made. Women justices regularly perform judicial functions in the Children's Courts.

(iv) *Protective Provisions*.—The criminal law contains special provisions with respect to the offences of ill-treating, abandoning, or exposing children in a manner likely to cause unnecessary suffering or injury to health; or of employing children for the purpose of begging or receiving alms (under pretence of singing, playing, performing or otherwise).

Guardianship and Custody of Infants (i) *Guardianship*.—The Guardianship of Infants Act, 1926, is in the same terms, with the necessary verbal alterations, as the Imperial Act. By an amending Act passed in 1927 the jurisdiction of Magistrates' Courts is extended so that a stipendiary magistrate has the same power as a judge of the Supreme Court to give consent to the marriage of an infant.

(ii) *Custody by Foster-parents*.—No person is permitted to maintain a child under the age of seven years apart from its parents, for a period of more than seven consecutive days, except pursuant to a licence granted by the Superintendent of the Child Welfare Branch of the Education Department. Relief from this requirement may be granted by the Minister of Education, in special cases, but the safeguarding of the lives of infants has been regarded as sufficient justification for a rule that may occasion some minor inconvenience to adults in certain cases. Grandparents, for example, must either obtain a licence or be exempted from the requirement of a licence before they can assume the care of infant grandchildren.

Foster-homes are under constant supervision by officers of State whose duty it is to ensure that infants maintained apart from their parents are properly cared for. Although cases of "baby-farming" are not unknown, they are happily very rare.

Women in Parliament.—Although women have been eligible for election as members of Parliament since the passing of the Women's Parliamentary Rights Act, 1919, no woman has yet succeeded in being returned. The right to vote at parliamentary elections was conferred on women in 1893; and since then men and women have had equal voting powers.

Property.—Part I of the Married Women's Property Act, 1908, is a re-enactment of the Married Women's Property Act, 1884, which adopted the provisions of the Imperial Married Women's Property Act, 1882, and the law is still substantially the same as the English law.

The rights of widows and children in the administration of intestate estates are defined at length in Part III of the Administration Act, 1908, which contains also the rules for the distribution of the estates of women dying intestate. These rules are now urgently in need of amendment, no material alteration having been made for at least a quarter of a century.

THE "MARKING" AND "CERTIFICATION" OF CHEQUES.

[Contributed by DR. L. LE M. MINTY, *Barrister-at-Law.*]

IN reading a review of Miss L. M. Mitchell's new work, *Le Chèque dans les Pays Anglo-Saxons*, which appeared in this *Journal*,¹ I noticed at the end the following: "It seems rather odd that in England itself we have never introduced the American and Canadian practice of using cheques 'certified' by the banker, a practice very extensively employed on the other side of the Atlantic, and extremely convenient."

As I recently had to advise on the point of the implied obligation which a bank in England undertakes when it marks a cheque, I thought it might be of interest to readers of the *Journal* to point out the difference between "marking" and "certifying" cheques under English, American and Canadian laws.

"Marked" Cheques.—The practice in England of marking cheques came into use as a result of the organization of the clearing house and its rule that balances must be struck between banks at a certain time and no cheques thereafter can be presented by one bank to another, so as to upset the differences which have to be paid and received by the banks after the day's final settlement has been struck. When cheques have been presented to the wrong banker, or have been handed in too late by a customer, or owing to press of business or for other reasons have not been presented before the clearing house has shut, it has long been the practice for the drawee bank to "mark" such cheques out of courtesy to the collecting bank. That is to say, the cheques are presented after hours at the counter of the branch on which they are drawn, and the cashier or ledger keeper looks up the account of the drawer, and, if he has sufficient balance to cover the cheques, he marks them with a rubber stamp "good," and initials the marking. It is usual to make a pencilled note of the marking in the account of the customer, but it is not the practice in English banks to debit such marked cheques to the accounts of customers in reduction of their balances at the time they are marked.

Marking Cheques in the Clearing House.—Marking a cheque for such a purpose is at least as old as the clearing house rules, but it is still undecided what is the implied undertaking of the bank which so marks a cheque. From the point of view of the bank which marks the cheque allowing

¹ *Journal of Comparative Legislation*, Third Series, vol. xi, pt. i, p. 171.

for the fact that it has not debited the cheque to the account of its customer, "marking" indicates nothing more than that the bank at the time of marking has funds sufficient to meet the cheque. Looking at the transaction from the point of view of the presenting bank it may be said that the cheque is not included in the clearing settlement of the day on which it is presented, because it would be inconvenient to strike new balances all round in the clearing house. There are, therefore, some grounds for construing a marking to mean that the cheque has been paid, and will be settled as a voucher if presented in the next day's clearing, or presented at the counter at the opening of business the following day. If this view is correct, the marking of the cheque amounts to constructive payment, and the marked cheque must be either looked upon as a paid voucher or an obligation of the bank which has marked it. In support of the latter view the judgment of Mansfield J. in *Robson and Waugh v. Bennett and Others*,¹ may be quoted :

It is the same thing as if a banker had written on a cheque—"We pay this to-morrow at the clearing house. . . ." The mark on the cheque is an engagement to pay at a particular place. . . . Is not then the presenting it at that place equivalent to presenting it at the banking house ?

And the headnote of the case says "such a marking under the practice amounts to an acceptance, payable next day at the clearing house."

In *Keene v. Beard*² Erle C.J., commenting upon the instrument which was the subject of that action, said : "It is drawn upon a banker and, though in practice the banker does not accept the draft, he might for aught I know do so." In *Goodwin v. Roberts*,³ commenting upon the growth of modern commercial custom, Cockburn C.J. said : "Besides this a custom has grown up among bankers themselves of marking cheques as good for the purpose of clearance, by which they become bound to one another."

It must be noticed that the *obiter dicta* of these judges—for it cannot be suggested that these references to the custom of marking cheques form any part of their judgments—were pronounced prior to the passing of the Bills of Exchange Act, 1882, and in view of s. 17 (2) of that Act which says that an acceptance is invalid unless it is written on the bill and is signed by the drawee, a marking on a cheque, whatever it once was, cannot any longer be taken as equivalent to an acceptance of the cheque by the bank. Thus in *Macbeth v. North and South Wales Bank*,⁴ Lord Alverstone said : "In ordinary parlance there is no acceptor of a cheque. The bank which pays the money alone stands in the position of acceptor. If the bank gives credit it simply honours the cheque and pays the money."⁵ There is also another difficulty that if the bank were to mark a bearer cheque so as to make it an obligation of itself, it

¹ [1810] 2 Taunt. 388 at p. 396.

² [1864] 4 C.B. at p. 382.

³ [1875] 10 Ex. 337 at p. 351.

⁴ [1908] 1 K.B. 13 at p. 18.

⁵ See also the Canadian case *Scott v. Merchants Bank*, [1911] 2 O.W.N. 514 : 17 O.W.R. 849.

would be infringing the monopoly of the Bank of England under the Bank Charter Act, 1844.

There is, however, nothing in any decision contradictory to the view that by marking the cheque the bank has provisionally paid it, and that after the cheque has been marked as between the presenting and drawee bank it becomes nothing more than a paid voucher. Any entries in the books of the drawee bank are not conclusive of payment or otherwise.¹ It might be said that a drawee bank may not pay cheques after business hours, and that if the drawer relying on the bank being closed delayed in giving notice of a countermand or payment until the following morning and the bank which had marked the cheque nevertheless claimed to debit the amount to his account, he could bring an action for breach of contract. Here again there is no decision directly on the point to give guidance. If a bank pays a cheque after hours bearing a forged endorsement, or to a person who has no title to it, the bank, not having paid it in "the ordinary course of business," gets no protection under s. 60 of the Bills of Exchange Act, 1882. That is perfectly clear. But the Act says nothing more. Cheques presented in the clearing are, as a matter of ordinary practice, paid and debited long after a branch has closed its doors to the public. A bank having paid such cheques presented through the clearing obviously runs no risk if a countermand of payment is delivered by the drawer next morning. Can it be said that if the cheques are constructively paid over the counter to a bank, because they failed to get through the clearing house in time, the omission to debit the amount in the bank's books of the drawer the same evening will make any difference? It is hard to see on what grounds it could. There is certainly no duty as between the presenting bank and the drawer to present such cheques in time.² On the other hand, the case of *Gibson v. Minet*,³ is frequently quoted as authority for the proposition that a customer is free to countermand payment of a cheque any time before it is actually paid and debited to his account. In that case the plaintiff gave a letter of instruction to his bank to take a sum off his account, and put it to the account of another firm of bankers, Mintern & Co., who presented the order. The appropriation was not made immediately, but the defendants made a pencilled note of it in the plaintiff's account, and some time afterwards the plaintiff countermanded the order. The defendants then made the appropriation. The Court held that the right of the defendants to debit the plaintiff's account depended upon whether the note in the plaintiff's account was intended to be conditional or absolute. The circumstances in that case were somewhat removed from those of marking a cheque, and no matter what the form of entry in the drawer's account, it may be taken for granted that if the bank by marking the cheque undertakes to pay the presenting bank its amount in any event,

¹ *Prince v. Oriental Bank* [1878] 3 A.C. 332; See also *obiter dicta* of Buckley J. in *In re Beaumont : Beaumont v. Ewbank*, [1902] 2 Ch. 889 at p. 897.

² *Boddington and Davis v. Schlenker* [1833] 4 B. and Ad. 752.

³ [1824] 2 Bing 7.

it certainly looks upon any pencilled note in the drawer's account as an absolute appropriation of funds to credit it, and regards the cheque as unaffected by future countermand or notice of death, bankruptcy or lunacy of the drawer which would otherwise affect its right to debit it to the account of the drawer.

Marking Cheques for the Drawer or Holder.—Within more recent times there has grown up a practice of marking cheques, not only for the convenience of banks in the clearing house, but also at the instance of the drawers and even holders. For instance, it is a common arrangement between London and provincial stockbrokers to arrange that bearer securities bought for the account of the provincial broker are to be lodged at the stock office of a London bank, and that the bank is to give them up to the agent of the provincial broker against payment of an amount advised. The London agent for the provincial stockbroker, instead of presenting a banker's draft, offers his provincial agent's cheque on a London bank. The stock office of the bank will not give up the securities until the cheque has been marked. The stock office accepts the marked cheque as equivalent to a banker's draft. What would be the position of the presenting bank if in the meantime the drawer had countermanded payment? In this connexion it is usual to quote the judgments in *Gaden v. Newfoundland Savings Bank*,¹ and *Imperial Bank of Canada v. Bank of Hamilton*.² Neither of these Privy Council cases in fact gives much assistance upon the interpretation of the implied contract in marking as carried out in English banking practice. The first decided that in Newfoundland the presenting bank by accepting deposit of a certified cheque must be deemed to have accepted it for the purpose of presenting it as the depositor's agent, and could not, in the absence of express agreement to that effect, be deemed to have acquired title to it in consideration of the credit entry, and thus to have gratuitously guaranteed its payment by the drawee bank. If, therefore, the drawee bank stops payment before it is presented the presenting bank can debit it back to the account of the customer for whom it is collected. The *Imperial Bank of Canada v. Bank of Hamilton*³ decided that where a drawer of a cheque drew it in such a form that it could be easily raised after its certification by the drawee bank, the drawee bank by certifying it was not liable to pay the holder the amount to which it had been successfully raised. This decision was based on the assumption that there is no privity of contract between a bank which certifies a cheque and a subsequent holder. It must be noticed that the position of the drawee bank was regarded as that of an acceptor of a bill of exchange and governed by *Scholfield v. Earl of Londesborough*.⁴ Canadian and American decisions have, however, little bearing on the position of the holder of a marked cheque under English law as the practice of Canadian and American banks in regard to certifying cheques is not the same as

¹ [1899] A.C. 281.

² [1903] A.C. 49.

³ *Cit. supra*.

⁴ [1896] A.C. 514.

the English practice of marking.¹ In America when a cheque is certified it is debited to the drawer's account, and credited to "certified cheques outstanding account" and thereafter it is treated as an obligation of the certifying bank.

The customer's balance is reduced by the amount of the cheque from the date it is certified, and the bank gets the benefit of the interest on the amount of the cheque while it is outstanding. It is for this reason largely that certifying cheques is such a popular practice among American banks. There are so many thousands of independent banking institutions in the U.S.A. that a presenting bank has no ready means of finding out whether the drawer has funds to meet the cheque or not, and unless the depositor has an ample balance a bank is diffident about giving credit straight away for a cheque, unless it is certified by the drawee bank. In England "marking" is done as explained above primarily for the convenience of banks in the clearing house. As interest is seldom allowed on current accounts, and in any event a cheque is not debited to the customer's account when it is marked, an English bank gets no benefit from marking a cheque, and it is only done as a courtesy for the holder to save the stamp on a banker's draft. Because the law relating to marked cheques is so unsettled English banks as far as possible discourage the practice and invite their customers to purchase a banker's draft where payees are not prepared to accept their cheques.

In America nearly all states have now adopted the Uniform Negotiable Instruments Act, 1897, which in ss. 187 and 188 recognizes the practice of certifying cheques. Under s. 187 certification is regarded as the equivalent of acceptance, and s. 188 provides that if the holder procures it to be accepted or certified drawer and all endorsers are discharged from liability. The sections are said to have been based on the New York rules governing certification which arose out of the decisions of the U.S.A. Supreme Court in *Merchants Bank v. State Bank*, 10 Wall 648; *Cooke v. Bank*, 52 N.Y. 96; *Farmers Bank v. Butchers, Etc., Bank*, 16 N.Y. 125; and *First National Bank v. Northwestern National Bank*, 152 Ill. 296.² Mr. Justice Peckham, in *First National Bank v. Leach*, 52 N.Y. 350, stated the law as follows:

The theory of the law is that where a cheque is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself. The reason therefor is so strong that the law presumes it is adopted by the banks.

It follows that after a cheque is certified, the drawer of the cheque cannot draw out funds then in the bank necessary to meet the certified cheque. The money is no longer his.

¹ See the writer's *American Banking Methods*, pp. 115-17.

² See article in *The American Register*, by Leslie J. Tomkins, reprinted in *Journal of the Canadian Institute of Bankers*, vol. ix, p. 323. Also articles by W. A. Bryant, 27 *American Law Register*, N.S. (1888), W. F. Elliott, 31 *Central Law Journal*, 373 (1889), and Francis R. Jones, 6 *Harvard Law Review*, 138 (1892).

If he apprehended danger from the suspected failure of the bank he could not draw out that money, because it had already been appropriated by means of the cheque thus certified; as to him, it was precisely as if the bank had paid the money upon the cheque, instead of making a certificate of its being good.

Although Canadian banking practice is similar to the practice of the United States of America in regard to debiting cheques to the accounts of drawers at the time they are certified, it would appear that the Canadian law is not exactly the same as the laws of those states which have adopted the American Negotiable Instruments Act, 1897. In Canadian law it would appear that the act of certification has nothing to do with the continuance or discharge of the drawer's obligation if the cheque is certified by the drawer before it is in any way negotiated. If the cheque is certified at the instance of the drawer, the certification merely amounts to saying that the cheque is good for the amount: the drawer remains secondarily liable. It would appear that if the account of the drawer is garnished before the cheque is presented, the amount will be included in the order in spite of the certification. If, on the other hand, the cheque is certified for the payee-holder the effect is the same as payment and "leaving the amount at the bank to be called for" by presentation of the cheque. If the drawee bank meantime stops payment the loss must be suffered by the payee-holder and the drawer is discharged.¹

The drawer is not discharged unless there has been an actual presentation by the payee-holder when the drawee bank was in a position to make payment. Thus in *Union Bank of Canada v. Nettleton*² the payee-holder of a cheque presented it for certification on the 18th. The bank certified it as upon the 17th, but in fact it had suspended payment after hours on the 17th. It was held that there had been no presentation for payment and the drawer was still liable. So in *Campbell v. Raynor*³ a solicitor for a mortgagor on the 17th offered a cheque to the solicitor of the mortgagee of some property which was due to be redeemed. The solicitor for the mortgagee refused to take the cheque unless it was certified. The solicitor for the mortgagor then obtained certification of the cheque, but before it was presented for payment, the drawee bank stopped payment on the 18th. It was held that the drawer of the cheque, the mortgagor, who became defendant, was still liable in an action on the instrument by the mortgagee as the mortgagor's solicitor had not acted as the agent of the mortgagee in obtaining certification.

¹ *Boyd et al. v. Nasmith*, [1889] 17 O.R. 40: see *Journal of the Canadian Bankers Association* (1902), vol. ix, p. 360; also *Banque Jacques Cartier v. Limoilou*, [1899] Q.R., 17 S.C. 211; *Brunelle v. Ostiguy*, [1911] Q.R., 21 K.B. 302; *Johnson v. Christmas*, [1924] Q.R., 37 K.B. 142; Falconbridge, *Banking and Bills of Exchange*, Fourth Edition (1929), pp. 858-61.

² [1924] 55 O.L.R., 643.

³ [1926] 59 O.L.R. 466; 4 D.L.R. 686, cf. *Lee v. Blake*, [1924] 55 O.L.R. 310; [1924] D.L.R. 369.

Law in England relating to Cheques marked for the Drawer.—In England there have been so far no guiding decisions upon the interpretation of the contract implied when a bank marks a cheque for either the drawer or the payee-holder. If a cheque is marked at the request of the drawer, it may be that the Court would take the view that the drawer thereby gave the bank an implied mandate to pay in any event the holder in due course who presented it. Such authority would enable the bank to refuse payment of any other cheques which would reduce the balance to a sum insufficient to meet the marked cheque. The sole purpose of marking a cheque is to add to its negotiability, and if the drawer were to be enabled to stop payment of it after he had obtained money or goods for it, or draw money off his account meanwhile so as to leave an amount insufficient to meet it, there would be little purpose in marking a cheque. If by marking a cheque for the drawer, the bank makes itself liable to a holder in due course, as apparently it does in the case of a cheque marked for a clearing bank, the drawer would probably be held liable on an implied contract to reimburse the bank, notwithstanding any defence the drawer might have had in an action brought by the payee on the cheque arising out of the business which gave rise to its issue. In Scotland there is a practice of marking cheques "good until ——" (a date mentioned), and the agreement implied seems to be to create an assignment of funds in favour of the payee or holder in due course available until that date. In England the presentation of a cheque does not act as an assignment of funds in the hands of the drawee bank.¹ It would therefore seem that since the amount of the marked cheque has not been debited to the account of the drawer at the time of marking, it would be subject to a garnishee order, as in Canada.

Marking for a Payee-holder under English Law.—There seems to be no reason why in English law marking for a payee-holder, other than a bank, should create liabilities different from those resulting from marking for purposes of late clearing already noticed. If marking for a payee-holder amounts to constructive payment, the drawer, as in Canada, is discharged and the bank is liable to the holder as upon an acceptance. If this is not the true inference, whatever contract is implied is one to which the drawer is not privy, and it would follow that he could draw on his account meanwhile or countermand payment. There are no English decisions on the point.

Initiailling Cheques Prior to Payment.—Some reference must here be made to the practice in some army banks, particularly during the war, of requiring cheques to be presented at a special counter for the signatures to be identified and the balances looked up before cheques were cashed by the paying cashiers. During the war, in a bank such as Cox's, there were a huge number of army accounts recently opened carrying fluctuating balances so that very nearly every account had to be referred to before money could be safely paid out, and for its

¹ Bills of Exchange Act (1882), s. 53.

own convenience an army bank kept a separate department, which initialled cheques as an indication that they might be paid by the paying cashiers. Apparently no entries were made in the drawers' accounts until actual payment, and the practice was looked upon as merely a convenience in the bank's own accounting system. In some instances unscrupulous customers got several cheques initialled in this way in excess of their balance by omitting to get them cashed at the counter, and negotiated them to tradespeople by representing that they had been " marked " by the bank, and were therefore as good as a banker's draft. I cannot find that any of these cases came to trial, but the decision would probably have been that as the initialling in these circumstances was only an internal accounting arrangement of the drawee bank, whatever are the rights of a holder in due course of a " marked " cheque as described above, cheques initialled in these circumstances would not be " marked " so as to make the drawee bank in any way liable.

AUSTRALASIAN CLAIMS IN ANTARCTICA.

[Contributed by PROFESSOR A. H. CHARTERIS, *University of Sydney*.]

(1) **The Australian Antarctic Expedition, 1929-30.**—What geographers have long called the "Australian Quadrant" of the Antarctic Continent is that quarter of the Antarctic region (some 2,000 miles in length) which lies between 90° E. and the 180° meridian. It might more properly have been called the "Australasian Sector" since Australia and New Zealand lie immediately to the north of it. But by the recent creation of the Ross Dependency, 1923, which extends from 160° E. to 150° W., a part of the Quadrant has been converted into a British possession leaving what Australian scientists now propose to call the "Australian Sector" (90° E. to 160° W.) which lies entirely to the south of Australia itself. This sector is included in the areas in the Antarctic to which the British Government asserts an existing (international) title by virtue of discovery.¹ And it is this sector which the Commonwealth Government has decided to have charted and explored by the Second Australian Antarctic Expedition, to be dispatched towards the end of the present year under the command of Sir Douglas Mawson, of the University of Adelaide, South Australia. It was in the Australian Quadrant, moreover, and indeed at Cape Bernacchi that the British Flag was hoisted in 1908 by Professor (now Sir) Edgeworth Davis, LL.D., F.R.S., of the University of Sydney, N.S.W., while a member of the British Antarctic Expedition, 1907-9.²

Part of this Australian Sector consists of Adelie Land, lying to the east of the territory explored by the Mawson Australian Antarctic Expedition under Sir Douglas Mawson in 1912. This land, which lies due south of Adelaide and the coast line of which does not exceed 150 miles, was first sighted and named in 1840 by a French navigator, Dumont d'Urville, who took possession of an adjacent island in the name of France, but did not set foot on the mainland. From France, however, it received no attention whatever until March 29, 1924, when *Le Moniteur* published a Presidential Decree making the Minister of the Colonies responsible for its administration. Later in the same year a Decree by the Minister of Colonies placed it, together with several islands in the

¹ See *Summary of Proceedings of Imperial Conference, 1926* (Cmd. 2768), p. 38, "... V. The area which lies to the west of Adelie Land and which, on its discovery by the Australian Antarctic Expedition in 1912, was denominated Wilkes Land."

² See Sir E. Shackleton, *The Heart of the Antarctic*, 1909, vol. ii, p. 96.

Indian Ocean, under the Governor-General of Madagascar as dependencies of that French possession. The Australian National Research Council thereupon urged on the Commonwealth Government in 1925 the need both of contesting the French claim and of establishing the British title to the Australian Quadrant by further exploration, which method was further advocated, moreover, alike in the interest of meteorological science, of wireless communications and of aviation. And it was at least partly at the instance of the Commonwealth Government that the topic of British Policy in the Antarctic figured in the agenda of the Imperial Conference, 1926, and led to the statement of British claims mentioned above. In this statement, however, Adelie Land, although it had been explored and delineated for the first time by Australian scientists, is not included. In the absence of British claim, no formal recognition of French sovereignty over Adelie Land appears to have been made on behalf of Great Britain.¹

At the Imperial Conference, 1926, the representatives of the Governments concerned, according to the *Summary of Proceedings*, studied the information available concerning the enumerated areas with reference to their possible utilization for further developing exploration and scientific research in the Antarctic regions.

On February 21 last year, Mr. Bruce, the Commonwealth Prime Minister, made a statement to the House of Representatives² concerning the Government's intention to equip and organize an Australian Antarctic Expedition which it was intended should leave Australia towards the end of the year, under the leadership of Sir Douglas Mawson, in order to complete the exploration of the Australian Sector lying between the Ross Sea in the east and Enderby Land on the west. The expedition, it was hoped, would be able to complete its work in the Antarctic summer season, which extends from November 1929 to March 1930.

While predominantly Australian in character and led by a distinguished Australian scientist and explorer, the expedition would enjoy the active co-operation of other parts of the Empire, inasmuch as H.M. Government in Great Britain had generously placed Captain Scott's vessel, the *Discovery*, at present in the service of the Falkland Islands Dependency, at the disposal of the expedition free of charge, and the co-operation of the New Zealand Government was confidently expected.

¹ A different fate awaited Bouvet Island situated in the South Atlantic Ocean in latitude 58 : 24 South and 3 : 30 East and lying to the south-east of Cape Town. This island had been claimed as British, but a competing claim by Norway led to negotiations between the Governments of the two countries in the course of which the British claim was abandoned; the Foreign Office thereafter notified the Norwegian Minister in London that Great Britain renounced her sovereignty over the island and would offer no objection to its annexation by Norway (*The Times*, November 16, 1928). Norwegian annexation followed. The island, it is understood, is to be used for intensive promotion of the lucrative Norwegian whaling industry in the South Seas.

² See Federal Parl. Papers, 1929, No. 36, F. 914.

The objectives of the expedition were (a) the exploration and mapping of the still unexplored part of the coast-line of the Australian Sector, (b) the study of meteorological conditions for the better determination of the relationship between them and the climate and weather of Australia, and (c) investigations into the fauna—notably, whales and seals—of the region explored. Accurate information under the last head was specially desirable in order to enable the Government to determine the economic and commercial value of the waters of the Australian Sector, as well as the measures of control which may be necessary in order to preserve them as a permanent source of wealth.

In deciding to organize the expedition in the present year, the Government had not been unmindful that at any considerably later date the special personal experience and knowledge of Antarctic matters gained by the men who were associated with the Mawson Expedition of 1911-14 would no longer be available.

The estimated cost of carrying out work for the period mentioned was £16,000. Since the date of Mr. Bruce's statement the Government has received a munificent contribution of £10,000 from Mr. MacRobertson, a well-known Melbourne manufacturer.

(2) **Ross Dependency Whaling Regulations, 1926.**—Governmental control of the number of whales to be slaughtered annually in a given area is effectively exercised in the Falkland Islands Dependency (which includes the South Orkneys and the South Shetlands), by reason of the fact that the licensed whalers have established their boiling-down factories on *terra firma* within the Dependency, where their catch can be controlled. And in point of fact a Board, on which the British Museum and the Governments concerned are represented, determines the number of whales to be fished annually, and is empowered to limit the number of gun-licences.

In the Ross Dependency the position is wholly different. It is indeed highly anomalous, for in virtue of an agreement (the benefit of which has since been transferred to the New Zealand Government) made in 1913 between H.M.G. and two Norwegian whaling firms the latter receive licences, which are not declared to be exclusive, to fish whales in waters undoubtedly constituting High Seas, to wit: the Ross Sea, which extends not less than 500 miles from east to west and 600 from north to south, and is comparable in area with the southern portion of the North Sea between Denmark and England.

In consideration of this privilege the Norwegian firms covenanted to pay to H.M.G. (now to the Government of New Zealand) a royalty of 2s. 6d. per barrel of whale oil gotten. What the counterprestation is in respect of which this royalty is charged is not disclosed in the account of the agreement printed in the *New Zealand Official Year-book*, nor was it made known to the writer in answer to the inquiry which he addressed to the Prime Minister's Department, Wellington, in July 1927. From another source it has been learned, however, that the Ross Depen-

gency Officer, who accompanies the licensed factory-ships to the Ross Sea, advises as to the kind of whales to be fished, as well as supervises the exploitation of their products—in the interest, no doubt, of the royalty due to the New Zealand Government. For a parallel to the present remarkable claim one must, I think, go back to the extravagant claims of James I and Charles I to exact licences from the Dutch to fish for herring in the North Sea and English Channel.¹

On the territory of the Ross Dependency, however, there are no shore-factories, their place being taken by large Norwegian "factory-ships," some of 16,000 tons burden, and so constructed as to be able to haul on board bodily blue whales up to 95 tons in weight and utilize their entire carcasses in remarkable boilers of German invention. The supply of carcasses is kept up by small "whale-catchers" which use the large vessel as parent-ship. For safety's sake in these tempestuous seas all those ships operate well outside the three-mile limit, often indeed at distances of 100–150 miles from land.²

Nor, of course (the Ross Sea being high seas), is whale-fishing in these waters confined to ships of the licensees. Unlicensed whalers, using the same methods, also engage in the pursuit, paying neither royalty to the New Zealand Government nor respect to its Ordinances. And making Hobart, Tasmania, their base, most carefully do they avoid visiting the waters or ports of New Zealand.

On complaint of the licensees the Governor-General of New Zealand, in his capacity of Governor of the Ross Dependency, sought to intimidate the "poachers" by issuing on November 4, 1926, the Ross Dependency Whaling Regulations,³ which recited the powers conferred on him by the Ross Sea Order in Council of June 30, 1923, and applied, with modifications, the New Zealand Fisheries Amendment Act, 1912, to the Ross Dependency. In addition to prescribing a licence fee of £200 for every licence permitting a vessel to be engaged in the whaling industry (s. 2 (27)) these Regulations, under penalties up to £1,000 for each separate day on which an offence is proved to have been committed, declared it to be an offence against the Regulations (a) for the owner or master of any vessel to engage in whaling without a licence under the Act; (b) for any person to establish or use a floating whale factory without such licence, with the like penalty on the owner or master of any vessel which was so used (s. 2 (1)–(4)).

Lesser penalties of £100 per day were imposed for failure to comply with the terms of a licence and for failure to convert "any whale received by the factory into commercial products within 48 hours after delivery of each whale to the factory" (s. 2 (5)–(6)).

To avoid the risk of proceedings in New Zealand for recovery of these

¹ See Fulton, *Sovereignty of the Sea* (1912), pp. 148 and 209; and Professor Pearce Higgins in *Cambridge History of the British Empire* (1929), vol. i, pp. 200–1.

² Cf. Villiers, *Whaling in the Frozen South* (1925), p. 95 and *passim*.

³ Cf. *New Zealand Gazette*, November 4, 1926, p. 3139.

formidable penalties the owners of one of the "poachers" (the s.s. *Polaris*) proposed to send her to Newcastle, N.S.W., to coal, and to that end sought advice (1) as to the power of the Governor-General of New Zealand to make the said Regulations applicable to foreign vessels and foreigners who engage in whaling in the Ross Sea beyond territorial limits of the Ross Dependency, and (2) as to the possibility of the Australian authorities preventing the *Polaris* from coaling at Newcastle if a conviction should be obtained against her in New Zealand for violation of the Regulations.

They were advised (1) that while an alien cannot initiate proceedings in a British Court to challenge the validity of administrative regulations of the Crown,¹ it is open to him, in defence to a prosecution or an appeal against a conviction, to challenge the application to himself of any Regulation that may be invoked²; (2) that the Regulations in question were probably *ultra vires*, and unenforceable by the New Zealand courts for lack of jurisdiction over matters taking place within the Ross Dependency, while no conviction, if obtained in New Zealand, could be enforced by those of New South Wales—the two latter propositions depending on the absence of an Order in Council under the relevant Imperial Statute purporting to confer jurisdiction on the Courts mentioned.³

While the Whaling Regulations have the wholly laudable object of regulating an industry indiscriminate prosecution of which may lead to the extinction of a valuable source of wealth, there seems to be but little doubt that the Crown, through the Governor of the Ross Dependency, has attacked the problem of regulation in the wrong way. And this for the following reasons:

By the Ross Sea Order in Council of July 30, 1923 (No. 974), the coasts of the Ross Sea with the islands and territories "adjacent thereto" (situated within certain widely separated limits of latitude and longitude) were declared to be a British Settlement and the Governor-General of New Zealand for the time being was appointed to be Governor of the Dependency with power to issue regulations.

The Ross Order in Council purported to be made under the British Settlements Act, 1887 (50 & 51 Vic. c. 54), which, however, does not authorize the Crown in Council to delegate its statutory powers to anyone, while by s. 3 it is to the Crown alone that power is expressly reserved of delegating all or any of the statutory powers of the Crown in Council,

¹ See *Poll v. the Lord Advocate* [1897], 1 Fraser 823 and 35 Sc. Law Rep., 637, following *Musgrove v. Chun Teeong Toy* [1891] A.C. 279.

² See *Mortensen and Peters* (the Moray Firth Trawling Case) [1906], 45 Sc. Law Reporter, 872.

³ On the invalidity of the Regulations the opinion of the writer is now fortified by that of Professor Berriedale Keith in *Responsible Government in the Dominions* (2nd edn.), 1928, pp. 792, 1039, and also at p. xviii, where the practice of the Executive in issuing Orders in Council without regard to the law is sharply criticized.

but then only to "any three or more persons within the settlement," and this by any instrument under the Great Seal or by any instructions under H.M. Royal Sign Manual, provided that such instrument or instruction is laid before each House of Parliament as soon as may be convenient. Notwithstanding such delegation the Crown in Council may exercise all or any of the powers under the Act.

Semble therefore the Regulations of November 4, 1926, made by the Governor of the Ross Dependency under statutory powers delegated to him alone by the Crown in Council purporting to act under this Act are *ultra vires* and consequently invalid. Nor, even if valid, can the Regulations bind foreigners or foreign ships except within the limits of the Dependency as defined in the Ross Sea Order. Although this is not expressly stated, these limits presumably include "territorial waters" in the ordinary sense, though whether they are to be measured from low-water mark on *terra firma* or from the edge of the adhering ice-field is uncertain.

Nor, again, can the Regulations be enforced in the courts of New Zealand as regards matters occurring in the Dependency in default of an Order in Council made under s. 4 of the British Settlements Act, which empowers the Crown in Council to confer the requisite jurisdiction on any Court in a British possession—a term which the Act defines as "any part of Her Majesty's possessions out of the United Kingdom." No such order has ever been made under this section. The Whaling Regulations, 1926, indeed, assume that they can only be enforced by an Officer of the Dependency. An Officer was, in fact, appointed by Regulation of the Governor on November 1, 1926, and vested with the powers and authorities exercisable by a stipendiary magistrate and of a Justice of the Peace in New Zealand. This Regulation, however, is also *ultra vires* of the Imperial Statute, for the reasons already stated.

Nor, finally, will the Territorial Waters Jurisdiction Act, 1878, serve to give jurisdiction over the offences in question to the courts of New Zealand or of New South Wales. For, while this Act asserts the jurisdiction of the Crown over crimes and offences committed by anyone, whether British or alien, in the open sea within three miles of low-water mark on the coast of any part of H.M. Dominions, it defines an offence as an indictable offence according to the law of England for the time being; the offences in question are declared by the Regulations to be punishable by fine alone and are presumably triable by summary jurisdiction.

In conclusion an additional illustration of the Hinterland principle which, according to Mr. Lindley,¹ has been invoked in support of the Australian claim to Adelie Land, may be cited from a most unlikely Australian source, to wit: the Naval Forces Regulations, 1921, no. 1, s. 26, made under the Naval Defence Act, 1912, and defining the limits of the

¹ M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, 1926, p. 5.

Australian Naval Station "which will be controlled by the Commonwealth Government acting through the Naval Board." The southern limit is declared, *tout court*, to be "The South Pole," and this although it clearly cannot be visited by the Australian Navy—at any rate by means of surface craft. The claim, however, is in accordance with Empire precedent. Is not the same Pole declared to be the southern limit of the Falkland Islands Dependency? (see Letters Patent of March 28, 1917, in *S.R. & O.*, 1917, p. 1153), and did not the Canadian Parliament by the North-West Territories (Amendment) Act, 1925 (15 & 16 Geo. V, ch. 48) claim all land contained within a sector included between the meridians of 60° and 141° W. longitude and extending from Canada to the North Pole?

THE MOHAMMEDAN LAWS AGAINST USURY AND HOW THEY ARE EVADED.

[Contributed by MIR SIADAT ALI KHAN, ESQ., D.PHIL., OXON.]

THERE is ample evidence in the law books and in books of literature,¹ law and history to show that the hard rules against usury were evaded from an early time. In books of literature and history we find them simply disregarded, and in books of law we find methods explained by which the rules can legally be avoided. The tide seems to have begun quite early. The founders of the three schools of the law are arrayed in opposite ranks on the question of the legal tricks to evade the law of usury: Abu Hanifa and Shâfi'e have allowed the legal tricks, while Mâlik and his disciples have prohibited them emphatically. This very difference of opinion is evidence of the presence of the question as early as the first quarter or so of the second century of Islâm.

In this article we will first state the legal point arising from the question of the legal tricks, followed by a very brief mention of the main arguments of the jurists for and against; then we will state the need that prompted legal tricks; and then we shall give a few illustrations of the contracts prohibited by the Mâliki schools because the jurists of that school regard them as legal tricks; this will be followed by a few instances of the legal tricks as allowed by the Hanafi and the Shâfi'e schools.

The Legal Point arising from the Question of the Legal Tricks.—When a person sells, say a garment, to another person for 100 dirhems on credit, and then purchases it back for 50 dirhems cash, there are two contracts of sale, perfectly valid in themselves if they are looked upon separately, as is quite clear. But if they are taken together it is obvious that these two valid contracts of sale become a legal trick to get a loan of 50 dirhems for 100 dirhems. The question is, shall the sales be allowed because they are *prima facie* perfectly allowable; or shall they be disallowed because the motive behind the sales is to legalize what is illegal, viz. usury. The Hanafi and Shâfi'e jurists hold that the contracts of the sales are to be allowed: because, in the words of Shâfi'e, "Contracts are legally established by the external evidence that they were properly concluded: the motive of the parties to the contract with which they concluded the contract is immaterial; it does not

¹ *Jawbâri*, p. 29, lines 5-25, etc.; *Manuscript Oriental* 9586, p. 14 (British Museum); *Agâni*, xvii. 140.

invalidate the contract.”¹ The Mâliki jurists hold that the contracts of the sales are not to be allowed because, though in some cases the motives of the parties to the contract are immaterial, in other cases “ motives determine the legality or illegality ” of the contracts² ; and in the sales under consideration the motive of the parties is illegal, and therefore the sales are to be held null and void. Thus the legal point raised by these sales, which are one of the best known³ legal tricks to evade the law of usury is, “ whether the judge shall always restrict himself to the external form of the contracts, although the motive behind them is palpably illegal, or shall the contracts be rendered void because of the illegal motive ? ”⁴

The Arguments for and against the Question whether Motive determines the Legality or Illegality of Contracts.—The main legal arguments of the Shâfi‘e and the Hanafi jurists for holding that the motives of the parties are immaterial in considering the validity of a contract are two. In the first place, motive is external to the essentials of a valid contract. If the parties to the contract are competent, if the thing about which the contract is made answers to the description of “ mâl,” or property, if the offer and acceptance are duly made so that there is a consensus of wills and the contracting parties are of one intention, of their own free choice, and the contract is not made dependent upon any conditions, the motive with which the parties concluded the contract is irrelevant : it will not render the contract inoperative or unenforceable. For example, if a person purchases the juice of grapes, and his motive is to make wine of it, the contract of purchase is valid, and the motive is immaterial to the validity of the contract ; or, if a person purchases a weapon, and his motive is to kill somebody, the contract is valid, and the motive is immaterial to the validity of the contract of purchase. Thus, motive being external to the essentials of a valid contract, it does not prevent a contract, valid in all essentials, from being operative, obligatory and enforceable. This is so, the jurists of the two schools assert, and this is their second argument, because “ God alone knows the motives of the man.” “ We can only judge the external deeds, and leave the motives behind to God.”⁵ “ The decisions of the Prophet regarding all civil rights and crimes ” were based, Shâfi‘e declares, upon this principle of judging the external deeds and not questioning the motives.⁶ As for civil rights, one example is the tradition in which the Prophet declared that “ I decide according to what I hear : if I give a judgment entitling a party to what really belongs to the other party, he shall not take it, for it is really a piece of hell-fire which I carve for him ”⁷ ; another example is that the Prophet has said that “ he who jests with the words that will make a binding contract of marriage, or with words that pronounce a divorce or declare a slave free, shall be taken to have meant

¹ *‘Ilâm*, ii. 51, 25.

² *Ibid.*, ii. 62, 15-16.

³ *Ibid.*, ii. 85, 27.

⁴ *Ibid.*, ii. 48, 24-26.

⁵ *Ibid.*, ii. 62, line 8, p. 71.

⁶ *Ibid.*, ii. 50, 21-22.

⁷ *Ibid.*, ii. 51, 27-28.

the words seriously.”¹ As for crimes,² Shâfi’e gives the example of Li’an.³ In the tradition about Hilâl ibn-Omeyyah the Prophet is reported to have said that “were not this the law of Li’an, as laid down by the Koran, I would have decided about the woman differently.” The law of the Koran referred to by the Prophet, Shâfi’e explains, is to decide according to the statements of the husband and the wife—ignoring circumstantial evidence. In this case⁴ the woman, before taking the fifth oath, faltered, and it seemed for a moment that she was going to admit adultery; she even said that she was not going to dishonour her tribe by her admission of adultery; and that is why she took the fifth oath. Thus there was a strong probability that the woman was taking false oaths, and yet the Prophet decided according to her own statement: “He judged by the external deed⁵ and left the motive behind the deed to God.” From the decisions of the Prophet in the case of Li’an, Shâfi’e draws two conclusions. Even on evidence, a probability, stronger⁶ than the evidence in the sales or transactions which are regarded by the Mâlikis as a means to something illegal and prohibited, *e.g.* usury, is not to be acted upon; this being so, the evidence in the sales which are means to something illegal is to be regarded as insufficient; and these sales “shall not be held void⁷ because of any condition agreed by the parties before the making of the contract or after making it, when the contract itself is free from the condition, or because they are a means to something illegal, or because the motive is bad (illegal).” The second conclusion is that “it is forbidden to a judge⁸ to pass a judgment against a person except on the most favourable interpretation of his statements; even when the statement contains a probability unfavourable to him (the person), the judge will have authority if he gives preference to the favourable interpretation.”

Now it must be said clearly and definitely that the above arguments of the Hanafi and the Shâfi’e jurists are on general legal principles not sound. Take their first argument that motive is immaterial to the validity of the contract. That is true in general, but it cannot be true always. It is true that motive is external to the essentials of a valid contract. But no legal system can shut its eyes completely to the motives of the parties to a contract. Certain motives must be declared illegal for the welfare of the society. Contracts to commit crime, for example, valid though they may be in all the essentials of a valid contract,

¹ *‘Ilâm.*, ii. 51, 26.

² The arabic word is *Hudood*. These are offences the punishment of which is specified by the law on account of the right of God. As it includes theft, fornication and slander, we have taken the liberty to render it by the word “crime.” But it includes, *e.g.* “drinking of wine,” and Li’an as well. Thus we beg to point out that the division of the offences in the two laws is not quite similar.

³ “Li’an, in the language of the law, signifies testimonies confirmed by oath on the part of a husband and wife, in case of the former accusing the latter of adultery” (Hamilton’s *Hidâyah*, ch. x, p. 123).

⁴ *Nail*, vol. vi, pp. 202-3.

⁵ *Viz.* her statement supported by her oath.

⁶ *‘Ilâm.*, ii. 51, 13-14.

⁷ *Ibid.*, ii. 51, 25.

⁸ *Ibid.*, ii. 50, 25-26.

must be null and void on account of the illegal motive of the parties. In short, it cannot be denied that on sound legal principles freedom of contract has got to be limited ; and the legality of the object of the parties must be an essential of every valid contract : motive is immaterial for the validity of a contract so long as it is legal. But when it is illegal the contract should no doubt be held void absolutely.

The following analysis by Ibn Qayyim of when motives are essential to a valid contract is interesting : " A person who uses words creating a contract either intends what he says or he does not ; if he does not intend, as in the case of a person under duress, no obligation binds him ; if he intends, then either he knows what he is saying or he does not ; if he does not know the meaning of what he says or does not keep it before his eyes at the time, then again, he is not bound by the legal consequences of his words. There is no disagreement among the Mohammedan jurists on this point. If he knows the meaning of his words and their implications are clear to him, then either he intends them or not : if he intends them, then the legal consequences of the contract will bind him ; and if he does not intend using them, then either he intends the contrary or does not intend any thing whatever. In the latter case, viz. when he does not intend more than uttering the words, he is jesting ; we shall explain the legal consequences in this case a little later on. And if he intends the contrary, then either he intends what is legal or what is illegal ; if he intends what is legal, as, for example, if he says about his wife that she is his mother, meaning in his love and respect, and not meaning divorce, the legal consequences of his words will not bind him ; if circumstantial evidence bears him out, otherwise his mere assertion without evidence will not be accepted. And if he intends what is illegal, as for example if he intends usury by the words of a sale, or the avoidance of poor-tax by the words ' I have made you the owner of my property,' then the law will see that his object is not realized ; for, if the law were to allow the realization of his object (by allowing and enforcing the contract), it would be the enforcing of what is forbidden, the avoidance of an obligation, the aiding and abetting of a sin, and the dismemberment of the shari'at." ¹

Now take the second argument of the Hanafi and Shâfi'e jurists that " God alone knows the intentions (motives) of the man." By this they mean partly that contracts shall be allowed without reference to the motives of the parties ; and this, as we have said above, is true in general, but is subject to the important limitation that the motive shall not be illegal ; the attempt of the jurists to ignore the question of the legality of the motives is, as we have seen, unsound on general legal principles. But Shâfi'e at least goes beyond this. He means by the dictum that " God alone knows the motives of the man " that " indirect evidence," that is the evidence of circumstances or probabilities, is not to be accepted. And he includes the evidence about any condition not

¹ 'Ilâm., ii. 57, 58.

part of a contract, but agreed to before the making of the contract, say a condition before making a contract about the repurchase of a thing by the vendor at a cash price far less than the price on credit on which he sold it, and which results in usury as we have already seen, among such inadmissible evidence.¹ This position is again untenable. Ibn Qayyim rightly disposes of it briefly by saying that the great majority of the Mohammedan jurists accept this kind of evidence and base their decisions upon it²; and indeed no system of law can do without accepting evidence of this kind.

It remains for us now to scrutinize briefly the instances which have been advanced on the side of Shâfi'e and by him in support of his view that motive is immaterial for the validity of a contract, although we have already seen that on general legal principles the opinion is not sound.

First, the tradition which begins with "I decide according to what I hear," etc.³ We submit that the tradition hardly bears out even one part of the contention of Shâfi'e, viz. that the Prophet judged by the external deeds only; for he decided after hearing the evidence, that is, after taking whatever steps were possible legally to find out the truth about the suit. The tradition is a moral exhortation, meant to appeal to the conscience of the successful but undeserving party.

Secondly, the case of jesting.⁴ The legal consequences of the words creating a contract of marriage or of the words pronouncing a divorce or manumission bind the person who speaks them, although he is jesting and does not intend them. We submit that these cases are exceptions, and the very fact that the Prophet selected them for mentioning shows that they are exceptions. The reason, as pointed out by Ibn Qayyim and others, is that "a right of God" is involved in these contracts; the jest is taken seriously, for "it is not desirable that a man shall jest with his Creator."⁵ In other words, the Prophet, owing to the importance of these transactions, thought fit to lay down as law that there shall be no jesting with them. Thus, it is not right to generalize from these cases, for the exceptions cannot be the rule. We may add that, on general legal principles the tradition has not much to commend itself. Its justification is, however, the great rashness of the fiery Arabs; they were too free with divorce especially: it is meant to teach them deliberation, the necessity of thinking before acting. It is similar to the salutary rule that when a divorce is complete there can be no remarriage before the wife has been not only married *de jure* to a third person but has cohabited with him *de facto* and has been divorced by him.

Thirdly, the case of Li'an.⁶ Shâfi'e's contention is that in the case

¹ See *supra*, p. 235.

² 'Ilâm., ii. 60, 5, 12-15, 15-30.

³ *Supra*, p. 234. It may be noted that this and the following tradition are not cited by Shâfi'e himself, but are given by Ibn Qayyim as they support the contention of Shâfi'e. We selected these two traditions for treatment because the traditions cited by Shâfi'e himself are weaker still; like the tradition of Li'an discussed in the pages above and the following pages.

⁴ *Supra*, p. 234.

⁵ 'Ilâm., ii. 59, 16.

⁶ *Supra*, p. 235.

of the wife of Hilâl the Prophet acted upon the statement made by her, although there was strong evidence of probability that she was telling a lie: and this proves the principle, he says, that we "shall judge by the external deed and leave the motive behind to God." But we submit that the great jurist forgets that she was taking an oath; and an oath is regarded as an evidence¹; the fact, then, is that the Prophet preferred the evidence of oath to the evidence of probability. If this be so, how can this tradition be said to be authority for disregarding motives, and evidence of probability? We must not forget that the alternative to acting upon the oath of the wife of Hilâl was capital punishment for fornication. And it is well known that Mohammedan law, on the authority of its founder, requires the utmost certainty for the execution of this sentence; and there was no such certainty in the case under consideration.²

In short, let us repeat that the attempt of the Shâfi'e and the Hanafi jurists to maintain that motive is always a non-essential in considering the validity of a contract, and that a contract is to be allowed even when the motive is palpably illegal, is unsound on general legal principles, and unsupported by any convincing authority from the founder of the Mohammedan law. Credit is due to the Mâliki law for taking this view. From the legal point of view the Mâliki law on this question is sound. It is amazing that the acute Hanafi and Shâfi'e jurists erred in this matter; it requires, we think, an explanation.

The Need that prompted Legal Tricks.—The explanation is the need that prompted these legal tricks. The need is that of a "way out" of the laws that press too hardly; the simple and rational way out is to amend, repeal or abrogate the laws. But as certain laws are regarded as Divine and Immaculate in Mohammedan law—the laws hinted at or at best very briefly dealt with in the Koran—this way out is impossible. So there remains a great deficiency in the Mohammedan system, viz. the power to revise or abrogate the laws of the Koran and the traditions that owing to the change of times may have become insufficient and create

¹ "Li'an is a testimony confirmed by oath" (Hamilton's *Hidâyah*, ch. x, p. 123).

² If the proposition falls, the conclusions also fall; therefore, the two conclusions which Shâfi'e has drawn from the decision of the Prophet in the case of Li'an (see *supra*, p. 235) fall. The conclusion, especially, that "a sale shall not be held void because of any condition agreed to by the parties before or after the making of the contract, if the contract is itself free from the condition," is important as it is the "fundamental basis" of the legal tricks. But as the principle of this condition and the principle that motives are irrelevant to a contract are correlatives; and as we have already seen, that this latter principle is unsound on general legal principles and unsupported by authority, the same holds true of the principle of the condition as well. But let us note that Ibn-al-Qayyim has a lengthy discourse on this point (*Ilâm*, ii. 62, 25-29, etc.) as on legal tricks (pp. 47-137) generally. This point is dealt with by him under the heading of "the barring of the means to illegal contracts"; for, by holding that illegal motive and a condition made before the contract makes a contract void, the means to illegal contracts are barred.

a hardship. The legal tricks supply this deficiency, by the method of legal casuistry, necessary because of the doctrine that we must regard the principles (the laws of the Koran and the traditions) as immutable. It was on account of this service rendered by the legal tricks that the Hanafi and the Shâfi'e jurists decided for their legality, although their legal position was not sound.

Speaking of this need of the legal tricks, a Hanafi jurist is reported to have said: "... Similarly, a person may be under dire necessity, and he may not find somebody to lend to him without interest: the legal tricks to circumvent the law of usury will be a way out from the hardship. If he does not take the way out he and his family will be lost. God cannot have intended such a law: and His shari'at which applies to all men cannot intend to create such a hardship. Thus there are here only three alternatives, of which one must be adopted: the person either shall ruin [lose] himself and his family, or take a loan on usury openly, or do the legal trick to evade the law of usury." ¹

It will be seen that the Hanafi jurist has overshot the mark. If the case of the needy person is of dire necessity, Mohammedan law recognizes the principle that "Necessity knows no law," ² and the needy person, to save his life, might openly take a loan on usury just enough to keep his body and soul together; for, "what is allowed [because] of necessity is limited to the necessity." ³ But let not the exaggeration of this jurist prevent us from seeing the real question. Society cannot do without taking loans. In the case of agriculture, for example, the whims of the weather and the uncertainties of the harvest compel the farmer to have recourse to loans. Loans cannot be had without paying interest. History shows that the experience of every age and every country is the same. Thus the precept of the Mohammedan law that all loans shall be free is impracticable. The Hanafi and Shâfi'e jurists, it seems to us, quite early realized this. Their remedy by way of legal tricks is, in our opinion, an euphemism for their acknowledgment of the insufficiency of the precept that all loans shall be free, i.e. without interest. But as their method was that of legal casuistry, it only solved half the problem, and that in a clumsy way. Loans on usury were in effect legalized, but no regulations were devised to curb the insatiable greed of the usurer from sucking the blood of his victims.

It remains for us now to show first, by a few select instances, how the Mâliki jurists who shut their eyes to the need that prompted the legal tricks enforce rigorously their sound legal principle that illegal motive invalidates a contract; and how, whenever they suspect the illegality of the motive of the parties to a contract, they hold the contract null and void. These illustrations of the rigorous prohibition of all sales amounting to legal tricks will be followed by a few illustrations of the legal tricks allowing usury, held valid by the later school of Shâfi'e, and the later Hanafi jurists.

¹ *Ilâm.*, ii. 84, 12-15.

² *Al Ashbah*, 108, 4-9.

³ *Ibid.*, 108, 9-10.

Sales held Illegal by the Mâliki Jurists because they suspect them to be Legal Tricks.—If A sells to B a garment for 100 dirhems on credit for a month and purchases it back from B for 150 dirhems on credit for two months, and takes the 100 dirhems at the end of the month, the sales are not allowed; for it is the sale on credit of dirhems for more dirhems; in other words the sales are prohibited because they result in the “usury of credit” and “usury of excess.”¹ The following sales are also prohibited for the same reason: A sells to B a garment for 100 Muhammadi dirhems on credit for a month, and then purchases it back for 100 Yazidi dirhems on credit for a month. The sales are regarded as a legal trick to legalize the sale on credit of Muhammadi dirhems for the better kind of Yazidi dirhems, or to evade the rules of usury of excess and credit.²

If A sells to B 10 ardebs (measures) of wheat for 10 dirhems on credit for a month and delivers the wheat to B, and after some time A purchases from B 8 measures (ardebs) of wheat of the same kind for 10 dirhems on credit for two months; the sales are not allowed because the jurists suspect them to be a legal trick for loan with excess; for the result of the sales is that B gives to A at the end of the month 10 dirhems, and takes them from him (A) at the end of two months; while A gives to B 10 measures of wheat and he (B) returns to A 8 measures out of 10 after they have been with him for some time and the two measures go to him in the bargain. Thus the two sales will be regarded as two transactions of loans, each party lending the other, on condition that A shall give B an excess of two measures as interest; the motive of the parties will be suspected and they will be regarded as doing the legal trick to legalize loan with excess by means of two valid sales.³

A sells to B a garment for 10 dirhems on credit for some time and then purchases it back before the time for 5 dirhems cash and a garment of the same kind or some other thing. The sales are not allowed because they result in a sale on condition of a loan, which is one of the categories of usury. This is so because A gets back the garment, and thus it is as if he (A) lent B five dirhems for, say, a month on condition that B should sell the garment with the 5 dirhems.⁴

If A owes B some money to be paid on a certain date, and on that date A purchases from B some goods for a part of the debt on condition that the remainder may be delayed till a future date. This is again a sale on condition of a loan, and not allowed.⁵

If A sells B two garments for 10 dirhems on credit for two months, and then A purchases back one of the garments for 5 dirhems on cash and a garment on cash. The sales are not allowed, for they evade the two rules of usury, viz. a sale on condition of a loan, and the sale of

¹ *Mudawwanah*, iii. 182, 2-6. ² *Ibid.*, iii. 182, 6-7.

³ Introduction to *Mudawwanah*, iii. 193, 11-14, and p. 194, 1-2.

⁴ *Mudawwanah*, iii.

⁵ *Ibid.*, iii. 190, 3-4.

pieces of silver and a garment on cash for pieces of silver on credit. The former rule is evaded because the transactions may be regarded as if A *sold* the two garments on credit for 5 dirhems, and B *lent* him the 5 dirhems on cash on condition that he (B) would get it back at the end of the two months. The second rule is evaded because the transactions may be regarded as if A sold B the two garments and the 5 dirhems on cash for 10 dirhems on credit.¹

A sells to B a garment for 10 dirhems on credit for a month, and then purchases it back for a garment of the same kind on credit for fifteen days. The sales are not allowed because they result in an obligation for an obligation. For, as A gets back the garment the sale about it is meaningless and the remaining transaction is to be regarded as if B sold a garment on credit for fifteen days, for a garment for 10 dirhems on credit for thirty days; and thus it is obligation for obligation and as such prohibited.²

If A sells to B, say, a garment for 100 dinars on credit till a certain date, and then B asks A for the revocation of the sale offering to give A 10 dinars on cash, the revocation is not allowed: for it is regarded as the sale of dinars for dinars on credit. It is also considered as the sale of dinars and goods for dinars: for B gives the 10 dinars and the garment for the 100 dinars he has to pay under the sale.³

These illustrations shall suffice; we have chosen one or two illustrations of the evasion by means of two valid sales or a sale and a revocation, of each of the most important categories of usury. The rigour of the Mâliki law and the extent to which it carries the suspicion of the illegal motive of the parties is perhaps most apparent from our second illustration; for the second sale in it is made after a time. *Mudawwanah* suspects the illegal motive even if the second sale is made after six months.⁴ If we do not think the cases given in the *Mudawwanah* and other books on Mâliki law purely imaginary, then it is clear that all the rules of usury were evaded as early as the time of Mâlik; for there is a ruling from Mâlik himself on almost all cases. Below we will give a few typical illustrations from which it will be quite evident that the legalizing of usury by means of legal tricks, beginning with Abu Yusuf and Mohammed, the disciples of Abu Hanifa, in the latter half of the second century of Islâm, was ultimately openly acknowledged in legal books of the following centuries as allowable.

A Few Instances of the Legal Tricks allowed by the Hanafi and the Shâfi'e Jurists.—I. *Legal tricks to legalize loans on usury.* (a) The two or more apparently valid sales of which the legal tricks consist may be made for a moveable thing or for land. Let us first take those legal tricks wherein the two or more apparently valid sales are made for a moveable thing. The most well-known and easy legal tricks to legalize loans on usury are called *Al-e'ynah*. These may be made in three ways.

¹ *Mudawwanah*, iii. 183, 8–12.

² *Bid'ayah*, ii. 117.

³ *Ibid.*, iii. 20–22.

Mudawwanah, iii. 184, 12.

(1) A asks a loan from B at the rate of 20 per cent. interest. B agrees. A then places an article before B and says to him that he sells the article for 100 dirhems. B purchases the article, gives A 100 dirhems and takes the article. Then A asks B to sell the article for 120 dirhems, and B agrees. Thus the borrower (A) gets a loan of 100 dirhems and gets back the article, and the lender (B) gets a claim against him (A) for 120 dirhems.¹

(2) Another legal trick. The lender, B, sells to the borrower, A, an article for a price on credit and hands over the article to him (A). Then A sells it to a third person, C, for less than he purchased it for; C then sells it to the lender B for the same price for which he (C) purchased it from A, so that the article might go back to him (B); C takes the price from B and gives it to A. Thus the borrower gets the loan, and the lender the "profit." This is the legal trick which Mohammed (ibn-al-Hasan, the disciple of Abu Hanifa) has mentioned. . . . It is related from Abu Yusuf (the other famous disciple of Abu Hanifa) that (the legal trick under consideration) is allowable and is deserving of heavenly reward. The parties to the transactions deserve the heavenly reward because of flying from what is prohibited (usury).²

(3) A needy person comes to another person and asks for a loan of 10 dirhems; the lender does not want to give a loan because of the greed of getting more, which he would not get in the case of a loan; thus he says to him: "I cannot afford lending; but I sell you this garment, if you please, for 12 dirhems, although its price in the market is 10 dirhems, so that you would be able to sell it for 10 dirhems in the market." The borrower agrees, and the lender sells the garment to him for 12 dirhems; and then the borrower sells it in the market for 10 dirhems, so that the lender gets a "profit" of 2 dirhems from this "business," and the borrower gets a loan of 10 (at 20 per cent.).³

The legal trick in (3) above Ibn-Qayyim says is the least bad of the three ways; and that Imam Ahmed Hanabal, according to one report from him, allowed it, if the borrower is under dire necessity.⁴ The legal trick mentioned in (2) above seems to have been the general way adopted to get loans on usury; for Ibn-Qayyim remarks with much exasperation that as the usurers know the sales to be fictitious and unreal, they have kept a "golden article," and some have kept an article and all such sales are made about them.⁵ There are a few variations of the second kind of the legal trick given in *Fatawai Qâdi Khan*, but we have no space for them here.⁶

(b) *The legal tricks to legalize loans on usury by a peculiar kind of sale of land.* The sale is called Bai-al-Wafa or Bai-bil-wafa. It is a sale on condition that when the vendor will pay back the price, the purchaser will return the land. The sale is illegal because of the illegal motive,

¹ *Qâdi Khan*, ii. 512.

² *Fatawa 'Alamgiri*, iii. 268.

³ *'Ilâm*, ii. 95 Bas.

⁴ *Qâdi Khan*, iii. 513.

⁵ *'Ilâm*, ii. 75, 8-10.

⁶ *Qâdi Khan*, ii. 512.

the motive being to legalize usury,¹ and because of the vitiating condition, for no sale for a time can be allowed.² But the jurists hold that they have allowed the sale and hold the condition binding because of the needs of men, the need, viz., of getting loans on usury. The author of the *Fusul-ul-'imâdi* then refers to the need of the people of Balkh and Bukhârâ for loans on usury in these words: "We have legalized the sale because of the need of the people, especially in our countries; because of the need, the people of Balkh have legalized by making it a custom, 'the loan and the hire of the vineyard,'³ although, as it is well known, the hire of the vineyard is not allowed. And the people of Bukhârâ have legalized by making it a custom, 'the long lease of the vineyard,' the lease of the vineyard being prohibited, they could only give the lease by making a sale, viz. the Bai-bil-wafa of the vineyard."⁴ As Sir Abdur Rahim points out, the jurists by acting thus have resorted to the well-known principle of Mohammedan law, viz., "Needs of men whether general or particular stand on the same footing as of absolute necessity [*i.e.* in justifying the relaxation of law]."⁵

The usury consists in allowing the proceeds of the land sold to the purchaser, *i.e.* the lender. There are ample provisions made to safeguard this interest of the lender: "The purchaser [lender] can draw all benefits from the land sold as he draws from his own property"⁶; "the purchaser becomes the owner of the usufruct"⁷; "the proceeds of the vineyards and the rent of the house [sold] are allowed to the purchaser [lender]."⁸ "The vendor the [borrower] cannot get back the vineyard by giving back the loan on the eve of vintage until after the vintage."⁹ "If the parties agree to cancel the contract, the lender will none the less have a portion of the proceeds, the portion to be determined by the length of the time the lender was in possession."¹⁰ After some difference of opinion it was finally settled that the rent of the house "sold," whether the house is rented to the third person or to the borrower himself, is allowed to the lender.¹¹

The jurists have discussed at length the character of the Bai-bil-wafa, viz. whether it is a sale, or a mortgage or an invalid sale, like that of a sale under duress.¹² We are not concerned with this question. The right opinion, however, seems to us to regard this sale

¹ We have already seen that the principle that motive even when illegal does not invalidate a contract is unsound. See pp. 235-6.

² Sales for a time are not allowed in Mohammedan law (*Fatawa 'Alamgiri*, iii. 268). The jurists therefore propose that the condition shall be made after the contract as a promise; and they hold the promise binding. We have already seen the effect of such a condition in making a contract void. (See note to p. 238, *supra*.)

³ The letting of the vineyard in consideration for the loan, if we understand aright.

⁴ *Fusul.*, i. 414.

⁵ Abdur Rahim, 296.

⁶ *Fusul.*, i., p. 411.

⁷ *Op. cit.*, p. 415.

⁸ *Op. cit.*, p. 416.

⁹ *Op. cit.*, p. 418.

¹⁰ *Op. cit.*, p. 433.

¹¹ *Op. cit.*, p. 421.

¹² *Op. cit.*, pp. 416-437.

as a composite sale, for it partakes of the character of all the three sales.¹

We do not think it necessary to give instances of the legal tricks to evade the various other categories of usury ; for in the previous section we have already given a number of them. Mâliki law prohibits these legal tricks ; they are to be allowed, according to the Hanafi and Shâfi'e law, as legal tricks are allowed in these schools. But let us add one or two legal tricks to evade the hard rules of the law of Sarf.

II. *Legal tricks to evade the rule of immediate delivery in Sarf.* If A wishes to change dinars² for dirhems, and if the changer has not got enough dirhems and A is willing to give him credit for a time, it is not allowed ; the legal trick for this is that A shall take the dirhems the changer has got, and then should give them back to him on a loan, and then again change the dinars for the dirhems, and so on, if need be, till he (A) exchanges all his dinars.³

III. *Legal trick to allow the sale on credit of specie.* If A wishes to sell B dirhems for dinars on credit, it is not allowed. The legal trick to allow it is that A shall purchase from B some goods and give the price (dirhems) and take the goods ; then B shall purchase back the goods for dinars on credit ; the credit for price is allowed.⁴

Conclusion.—Our comment will be confined to one or two remarks, for we have already commented in the sections themselves. We want to point out that the legal tricks made possible the decrees enforcing usurious contracts by Mohammedan courts. The transactions of usury were made by the parties who adopted the legal tricks in the form of contracts of sales, and as such enforced. In the case of Bai-bil-wafa, the product of the land "sold" was not only decreed to the lender, but, as we have seen, much solicitude was shown to safeguard his interest. And it was in the form of a legal trick that at last usury received legislative recognition by the Caliphs of Turkey, as the commentator of *Dur-i-Mukhtar* informs us.⁵ The comforting theory of Mohammedan jurists on the Firman of the Sultan of Turkey was that the duty of the judges was to carry out the law laid down by the Sultan. Beyond this, they said nothing and kept a discreet silence—discreet because the implication is plain that the Sultan, if he thinks it necessary in the public interest, can pass a law which violates the law of the Koran, if not in form (for it was a legal trick and the transactions in a legal trick are good in form) certainly in effect and intention.

¹ *Op. cit.*, p. 414 ; also cf. Abdur Rahim, p. 296 ; also *Fatawa 'Alamgiri*, Bk. iii. ch. 20, p. 268.

² A dinar is a gold coin and a dirhem is a silver coin.

³ *Ilâm.*, ii. 87, 17-19.

⁴ *Ibid.*, ii. 87, 19-21.

⁵ *Rud.*, iv, 243.

INDIAN PRISONS.

[Contributed by J. CHINNA DURAI, ESQ., *Barrister-at-Law, Late of the Indian Prison Service.*]

At a spacious hall in Windsor Castle, known as the Waterloo Hall, there is a large and beautiful carpet adorning the floor. It has been the marvel and wonder of many a visitor—and rightly so, as it is the only one of its kind both in size and beauty, and in fact the largest one-piece carpet in the world. The admiration with which this wonderful specimen of handicraft is beheld by visitors is intense indeed, but it is nothing compared with the surprise it causes on being told who made it. To no greater person than the humble Indian prisoner that unique honour belongs! That briefly is a picture of the Indian prisoner—rather an uncommon individual—and a discourse on his official abode, namely the Indian prisons, ought to be informative if not interesting to the British public.

Indian Prison System.—Nearly a hundred thousand prisoners are convicted in India every day! There are over two hundred prisons in the country; with an average of twenty-five prisons for each province or presidency, for the administration of which the various local Governments are responsible. Each prison is in the executive charge of a Superintendent, who corresponds to the rank of a Governor in this country—and all the prisons in a province or presidency are controlled by the Inspector-General of Prisons, who mainly directs the policy of administration, and who is ultimately responsible to the local Government. Thus, for instance, in Madras there are twenty-two prisons governed by twenty-two Superintendents, controlled by one Inspector-General, who, in turn, is answerable to the Madras Government. The system of administration practised in different provinces is often the same, but it varies in a few cases, where there are some slight differences, owing perhaps to peculiar climatic and other conditions of the locality, customs of the people, or sometimes the influence of the local Government. The various provincial divisions under which the prisons in India fall are: (1) The United Provinces, (2) Bengal, (3) Central Provinces, (4) the Punjab, (5) Bihar and Orissa, (6) Madras, (7) Bombay and (8) Burma.

A hundred years ago prisons in India were not considered a distinct institution demanding separate and exclusive attention. For each district there was a small jail known as the Zillah Jail, and the local magistrate, in addition to his multifarious and responsible duties as magistrate and judge, was also a part time jail officer. But when committals became numerous and the need for bigger prisons arose—

which meant greater responsibility and more attention—it was found necessary to make a distinct department of it. As a result there are in India to-day the following different types of jails, namely: (1) The Central Jail with accommodation for nearly 1,500 prisoners; (2) the District Jail with an average population of 300 prisoners; (3) the Borstal Institution for adolescents; (4) special jails such as those for military and political prisoners; and (5) civil jails for debtors. It is perhaps well to point out here that in most of the provinces there are no separate prisons for women, like the one for instance at Holloway, in England. There are also no Borstal Institutions for girls, like the one at Aylesbury, or remand prisons similar to Brixton.

The Central and District Jails are the chief features of the Indian prisons system. The former are intended for prisoners with long sentences, while the latter are for those with short sentences. The long term prisoners are usually employed in organized industries, while the short term prisoners are made to do some work or other which does not require much skill, *viz.*, cooking, farming, gardening, scavenging, etc. The reason for giving the latter class of prisoners such kind of unskilled labour is that during their short stay in prison it is neither profitable nor possible to teach them any trade or industry. But if there are among them men who are already skilled in some industry or other, they are usually put on work they are best qualified to do. Apart from the above classification of prisoners according to sentences, there is also another mode of classification based on the character of the prisoners and the nature of offences committed by them. For instance, the first of the “star class” are kept apart from the habitual prisoners, and the “best” prisoners are confined separately from the “worst.” Between the “best” and the “worst” there is another class known as the “intermediate class” of offenders, who are not allowed to mix with either of the other two. The prisoners are either confined individually in cells or in association in wards. The latter kind of detention is due to the general dearth of cellular accommodation in Indian jails, although the tendency on the part of the authorities has for some years past been to explain it away as one of the things essential for the well-being of the prisoners!

Prison Reform.—The above in the main is the bare outline of the Indian prison system. It is modelled mostly on the English prison system, but while the latter has made rapid strides towards advancement and improvement during the last twenty years, the Indian prisons have ceased to grow and have been more or less at a standstill owing chiefly to the spirit of contentment, that often comes over India with regard to most things and the lack of initiative necessary for improvement of any nature. The Government of India conceived the idea of prison reform so early as 1836, and appointed a Committee in that year to inquire into prison conditions with a view to reform. The Committee had on it—among other members—a celebrity—and that was the late Lord Macaulay. They reported, after an inquiry, that in essentials of cleanliness, provision

of food and clothing and attention to the sick, the Indian prisons compared favourably with European prisons. The Indian Government seem to have been so satisfied with the report that they did not inquire into the prison conditions again till after a quarter of a century. The next Committee was formed in 1864, and while it lasted did not achieve any important results. For twelve years afterwards there was a lull, when there was a conference in 1877 of officials engaged in actual jail work, who came to the extraordinary conclusion that there was nothing wrong with the Indian prisons! It is well, perhaps, here to point out the futility and folly of expecting jail officials to give their opinion on prisons with a view to reform. They are grown into it, and in fact see so much of it every day that there comes a time when their sense of criticism with regard to matters of jail administration, for which perhaps they are themselves responsible—and over which they are themselves heads—ceases to function, and the result is they do not or cannot see defects so well as outsiders can. Similar to the useless conference of 1877, there are still some periodical conferences at the present time when Inspectors-General of Prisons of various provinces meet and discuss prison matters with a view to reform. This meeting usually ends in nothing, and all that actually happens is an enormous loss of Government money paid by way of travelling allowances in order to bring these officers together. In 1888 another Jails Committee was appointed by the Government of India—*i.e.* eleven years after the conference of 1877—and the last and recent Jails Committee was appointed in 1919—thirty years after the previous one. By the long and extraordinary lapse of time that has been systematically and negligently allowed to intervene between the appointment of one Committee and another, it will be observed that the Government of India have shown no great anxiety or keenness to reform jail matters. In the light of the following extract from the report of the Indian Jails Committee for 1919-1920, which reads thus—"Witness after witness from almost every province in India has with singular unanimity declared that Indian jails do not exercise a good or healthy influence on their inmates, that they tend to harden if not to degrade, and that most men come out of prison worse than they went in"—it will be well to consider a few details with regard to prison administration in India.

Jail Industries.—These are varied and numerous, the chief among them being: (1) jute and cotton manufactures; (2) woollen manufactures; (3) carpentry; (4) leather industry, etc. The Jail Department has shown a tendency in recent years to look upon them as the end itself instead of as a means to an end. The primary object of these industries is to provide labour for prisoners so that they may have a deterrent and reformatory influence on them. But, like the Forest and Excise Departments, which bring revenue to the Government, the Jail Department also is being gradually regarded as a profitable concern, and the result is that the prisoner is looked upon more or less as a chattel for the time being at the disposal of the State and exploited ruthlessly. The prisoners,

owing to such treatment, develop during their stay in jails such distaste for the work they have been doing that all the skill and training they acquired in jails are of no avail, as when they do go out they naturally resort to a life of ease, or in other words idleness or perhaps crime.

Education.—At present there does not seem to exist any consistent method of educating the Indian prisoners. There is much to be desired in this direction. As in England, compulsory elementary education for prisoners under twenty-five years of age should be introduced. Moral and religious lectures of a non-controversial nature should be given to them frequently. In England there is not a single prison without a library attached, but in India there are no libraries in any of the prisons. The educative value of books on prisoners need scarcely be emphasized. Apart from their value as being a source of knowledge, they ought to help greatly to break the dull and gloomy monotony of the night between the “lock up” time, which is usually 6.30 p.m., and the “sleeping” time, which varies from 9 p.m. to 10 p.m. To insist on a prisoner sleeping twelve hours perhaps against his will, is not only to cultivate in him a tendency to idleness, but also to encourage him to indulge too much in vicious thoughts and criminal scheming.

Religion.—In England the prisoners’ needs with regard to the matter of religion are fully satisfied. For a Church of England man, there is the Protestant Church; for the Catholic there is the Roman Catholic Church; and for the Jew there is the Synagogue. They are all given excellent facilities for worship, and observe their festivals, such as Christmas and Easter. The Indian prisoners are not so well catered for with regard to their religion. The Moslem and the Hindu—and the various other denominations of India—have simply got to bid farewell to their religion when they enter the prisons. A Hindu or a Moslem, in his conception of God and worship, is by nature very fervent and intense—and therefore every reasonable facility ought to be afforded him with a view of giving him a chance to be religious during his sojourn in the jail.

Punishments.—Flogging, handcuffs and fetters, separate, cellular and solitary confinement and penal diet are the chief modes of punishing convicts for offences as prescribed in the *Jail Manual*, but recent inquiries have brought to light that jail officials are also in the habit of administering unauthorized punishments. To name a few: (1) Beating with a shoe. (2) An aggravated form of corporal punishment known as *Giddurkut*, peculiar to the Punjab. (3) *Kan* parade, *i.e.* a man is made to bend double, to pass his head under his legs and to touch or hold his ears—usually enhanced by blows and kicks. (4) *Gultha*—*i.e.* the prisoner is pushed with a jerk from behind the neck, and sometimes kicked as he totters to gain his balance—common to Madras—and mostly administered by warders.

Indulgence.—With the connivance and help of the warders, who are very low paid men and who are anxious to increase their income by every conceivable manner, the prisoners in Indian prisons can contrive

to have any article of luxury. Money is often transferred to prisoners by relatives who visit them, and also sent by money orders to warders for delivery to the prisoners. The articles that are commonly smuggled into the jails are cigarettes, ghee, butter, fruits, and liquor.

Jail Officers.—The officers of the grade of jailer, and below, do not possess an irreproachable code of morals, and have shown a tendency to earn money at the expense of the Government and prisoners. They associate too much, or rather conspire with, the contractors who supply materials and provision to the jails, and come to some private financial arrangement with them unknown to the higher officers which is not by any means conducive to decent administration.

Racial Differences in Jail.—The prisons, as it is but too common with regard to various other walks of life in India, are not without this drawback or injustice. There is one kind of treatment accorded to a European prisoner, both in the matter of comforts and food, and another to the Indian prisoner. Perhaps it may be argued that it is only reasonable that they are both treated in a manner best suited to their general tastes and customs. Why is it then that it happens that an Indian, convicted and imprisoned in England, is not given his own customary treatment?

The Recruitment of Jail Officers.—By apportioning a large number of high appointments to the Indian Medical Service men, the Government have narrowed the sphere of selection—and many a far-sighted and well qualified man in the science of penology is rigorously shut out of the department. There is no need to be particular about choosing a medical man to fill the place of appointment as Superintendent, as it was proved in the recent sitting of the Indian Jails Committee that the Medical Branch of the Jail Department can be, with better advantage, entrusted to a separate medical officer. The Indian Medical Service men look upon the Jail Department as a haven of rest—after perhaps their more strenuous work elsewhere—and are more or less mere signing machines entirely dependent on their subordinates to guide them in the matter of administration with regard to every detail. It is no wonder that the staff resort to malpractices under their very noses. Recruitment ought to be made by competitive examinations as it is done in the Police, Indian Civil Service, or Forest Departments. Too much responsibility is thrown on the Inspector-General of Prisons with regard to the selection of a candidate for appointment as Superintendent, and a Superintendent is sometimes appointed who is very inadequately qualified for the responsible position of a Superintendent, at the fag end of his service, for no better reason than that he may draw an enhanced pension on retirement! The man may never even have seen what a jail was like.

These, then, in the main are the existing drawbacks in the Indian prison system to-day. The only way by which conditions could be improved would be to appoint competent commissions, which would make a thorough and searching investigation into prison affairs with a view to reform.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[Contributed by PROFESSOR BERRIEDALE KEITH, D.C.L.]

Imperial Unity in Foreign Policy.—It proves the advance in Imperial relations since 1924, when the Labour Government marked its entrance upon office by the spectacular grant of recognition *de iure* to the Soviet Government, without consultation with the Dominions, that the King's Speech should have made it clear that the question of resuming diplomatic relations with the Soviet Government would be determined after consultation with the Dominion Governments. Even in 1924 the action taken was resented, and promises had later to be given to secure consultation. It seemed, however, from the first discussions in Parliament that the Government contemplated taking a decision and rendering it operative without obtaining the approval of the House of Commons. This was clearly a strong step to take, and fortunately on July 15 it was announced by the Prime Minister that he would adhere to the precedent of 1927, when diplomatic relations were severed, so that, while the Government would take its decision, it would not be made operative until the House had been able to discuss it. It was, however, left uncertain whether the Government would insist on according recognition if the Dominions or some of them demurred. A similar obscurity was left in regard to the issue of the acceptance of the compulsory jurisdiction of the Permanent Court of International Justice. In both cases the desirability of united action is clear and undeniable. It is true that it cannot be pronounced to be absolutely essential; the resumption of diplomatic relations might be confined to parts only of the Empire by an express intimation to this effect by the Imperial Government in renewing relations, but such a procedure would be extremely undesirable and awkward. If the preliminary condition of cessation of anti-British propaganda in any part of the Dominions is secured, then agreement on a common recognition of the desirability of resuming formal relations might well be easy. As regards the jurisdiction of the Permanent Court, there is doubtless much to be said for Sir A. Chamberlain's arguments that it is unwise to restrict action to this special channel when disputes may well be better suited for such a tribunal as the Council of the League. But agreement to accept might be general if suitable reserves were formulated. It is obvious that inter-imperial disputes should be excluded *ex maiore cautela* expressly from possibility of compulsory reference, as well as issues of maritime law in time of war and immigration. The view of Canada that immigration could not be made

an international issue is not wholly shared by Australia or New Zealand, and a specific exclusion would in any case be advisable. On the whole the formula of acceptance actually adopted on September 19 seems to meet all needs, but discussion of it may be deferred.

The Pact to Renounce War.—The approval which has been readily manifested by both Houses of Parliament in the United Kingdom for the acceptance of the treaty of 1928 for the renunciation of war was, very naturally, held by the Imperial Government to afford sufficient authority for the ratification of the treaty when the other Governments of the Empire had expressed their acceptance of ratification. But the question was not unnaturally raised in the House of Commons on January 28 as to the existence of reservations by the British Government. The reply of the Foreign Secretary was to the effect that there were no British reservations any more than there were any American. In effect this denotes that in the view of Sir A. Chamberlain the Monroe doctrine for the British Empire, which was enunciated in his note of May 19, 1928,¹ is simply a counterpart to the corresponding doctrine for the United States, which is a necessary reservation presupposed in any diplomatic instrument concluded by the United States. Care, however, was taken by Mr. Mackenzie King in the Canadian House of Commons to assert that the Canadian ratification was without reservations, though he did not eliminate interpretations, so long as they were not used as a mere mode of enabling a State to go to war, while asserting that it was obeying the treaty in spirit as well as letter. Pressed on the point by a spokesman of the United Farmers' Party, Mr. King maintained that the reservation made by Sir A. Chamberlain had become negligible, because so many States had accepted the treaty, for the result was that, if any of these States entered on a war of aggression, all other States were *ipso facto* released from any obligation under the treaty. In the Irish Free State a more definite attitude was taken; the Minister for External Affairs asserted on February 21 with great emphasis that the Irish acceptance of the treaty was subject to no reservation other than that it must be consistent with the obligations of the Free State under the Covenant of the League. He expressly repudiated the doctrine of tacit acceptance of any reservation or interpretation placed on the instrument by the British Government. Senator Johnson raised once more the old issue whether such a pact applied as between the several portions of the Empire, but, in view of the negative doctrine adopted by the Imperial Conference of 1926,² the Minister was unwilling to give an affirmative reply. But he assured his interlocutor that, from the terms of the treaty of 1921, the discussions at the Conference of 1926, and the Kellogg Pact, he believed that the other parts of the Empire renounced war as

¹ *Parliamentary Paper*, Cmd. 3109, p. 25.

² See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. 1, p. 89. The controversy was revived in the Union and the Free State in connexion with the acceptance of the optional clause.

a mode of procedure applicable to their relations *inter se*. It is of interest, though not of importance, that the ratifications of the treaty for the several parts of the Empire were handed in as distinct instruments, those for Canada and the Irish Free State by their own envoys.

The Ratification of Treaties.—The difficulties of the more recent practice of asking Parliament to approve the ratification of treaties before this step is taken, are illustrated very neatly by the controversy in the Union of South Africa over the ratification of the Paris treaty of August 27, 1928, for the renunciation of war, and the treaty between Germany and the Union of September 1, 1928, regulating trade relations. General Smuts, on his return from the Peace Conference in 1919, adopted the attitude that under modern conditions the power of the executive Government to bind the country by treaties should be subjected to the control of Parliament, and duly submitted the Treaty of Versailles to that body, a precedent followed more or less regularly in the Union, while a similar course has been adopted in the Dominions generally in respect of important treaties or those specially affecting them. It was, therefore, naturally held in the Union that it was General Hertzog's intention to obtain the approval of Parliament for both treaties when the Governor-General's speech on January 25, 1929, promised the submission of the compacts to Parliament. In point of fact, however, General Hertzog's German treaty evoked so much disapproval that it became clear that it could not be carried through the Senate, and his course of action therefore was modified. The Paris Pact was duly presented to the Assembly, and the Prime Minister moved approval, which was carried; but though the Senate was notoriously ready to act similarly, no proposal for its approval was submitted to that body. This evoked from Mr. Malan on February 11 a motion protesting against the form of procedure as denying the Senate the exercise of its functions, in accordance with the spirit of the Constitution, in the ratification of the treaty; but this failed to pass by a majority of 14 to 13. In the debate General Hertzog enunciated some rather remarkable doctrines, including the assertion that the Conservative Government in the United Kingdom had realized that publication might be against the national interest, and that in the same way the Union Government would reserve the right not to lay treaties before the Houses where this was not in their view in the public interest. He admitted that treaties affecting personal liberty, cession of territory or taxation must so be laid. But, despite this admission, he refused in the case of the trade treaty to ask the Senate to concur in ratification, thus raising a rather difficult issue. The Imperial Conference of 1926 distinctly recognized that it lies with each Empire Government to decide whether or not it should take the opinion of Parliament before ratification, and thus it is clearly open to a Dominion Government to secure the royal ratification before it has obtained the assent of Parliament, even in a case where legislation will be requisite to secure the carrying

out of the treaty. Under the earlier rule as asserted by Lord Ripon¹ in 1895, and regularly observed since that date, the Imperial Government claimed that, before any treaty was ratified, there must be assurance that it would be made effective by the necessary local legislation. Had this rule persisted, then the Union Government would have been unable to ask for the royal ratification of the treaty of 1929 until it had obtained the assent of the Senate. Under the terms of the tariff legislation of 1925, the passing of resolutions by both Houses would be sufficient to allow the acceptance of the treaty with Germany, but the attitude of the Senate forbade the possibility of this being accorded, and induced the determination of the Government to ask only the assent of the Lower House to ratification. The result, of course, of ratification in these circumstances must be the imposition on the Union of a treaty obligation, which the Parliament would be under a strong measure of compulsion to make good. Obviously it would be a very undesirable proceeding that on the eve of a general election the assent of a bare majority of one House should be deemed as justifying the imposition of a treaty obligation on the Union, and there is much to be said for the contention that such action was completely unconstitutional. It is, therefore, fortunate that the result of the General Election, by securing a majority for General Hertzog, should have eliminated the possibility of a failure to carry through the necessary legislative approval.

Egypt and the Dominions.—It was inevitable that the termination by enforced resignation of Lord Lloyd's tenure of office as High Commissioner in Egypt should have excited interest in the Dominions, for, while Canada has shown a marked determination to remain free from connexion with the Egyptian question, the Commonwealth and in some degree New Zealand regard the issue as one vitally affecting the security of their communications with the United Kingdom. Admittedly it was impossible to consult with the Dominions as to the supersession of Lord Lloyd, but the emphatic assurances given that Dominion views would be carefully taken before any final result was achieved afforded a satisfactory settlement of the point. Australian opinion as voiced by Mr. Hughes is, of course, strongly opposed to any step likely to diminish security; but there is no reason to suppose that the Commonwealth or the New Zealand Government does not realize that a cordial agreement with Egypt, accepted by the Egyptian Parliament as well as by the King and his Ministers, would be a far better security than the maintenance of a more extensive military and political control. The final decision necessarily lies with the Imperial Government, which alone bears the burden of the conduct of control over Egypt. The same consideration applies to the fundamental issue of the Anglo-American negotiations for parity of naval power; though any accord must include the Dominions it is plain that the decision must rest with the Imperial Government, though Dominion views must be carefully weighed.

¹ Keith, *Responsible Government in the Dominions* (1927), ii, 855.

Dyarchy in Malta.—The curious and complex constitution granted to Malta by the Letters Patent of 1921 has inevitably proved excessively difficult to work without friction. Inspired in part by the Indian model, the Letters Patent were perhaps ¹intended to create a double government, vesting in matters concerning defence and foreign relations, with certain specified exceptions, powers in the Imperial Government, both as regards legislation and administration, while according in all other questions the fullest measure of responsible government. But if this were the intention, it is plain that it has not been given effect to in the Letters Patent, which are silent as to administration of the matters which as regards legislation are reserved. The legal effect, accordingly, of the Letters Patent is clearly to leave the administration of these matters in the same hands as before the new constitution was granted, that is, divided between the departments of the Imperial Government represented in Malta and the local Government. But at the same time the local Government has been made a responsible Government, and responsibility has been made statutory by s. 54 (5) of the Letters Patent, where the general principle is laid down that the relations of the Governor and Ministers are assimilated to those of the King and his Ministers in the United Kingdom. It is clear, therefore, that for carrying out Imperial policy as regards matters on which legislative power is reserved the Imperial Government, unless it passes special legislation, depends on the aid of the responsible Government. This, of course, is a perfectly natural position, and one familiar from the early days of responsible government in the colonies. The Imperial Government then retained defence and the control of foreign politics in its own hands, but it relied for the execution of its policy on the local Government. There seems, therefore, no ground for the claim recently urged by the Governor in a very voluminous correspondence ² recently presented to the Maltese Parliament that power to administer reserved matters is inherent in the Imperial side of the administration, and that Ministers can do so merely by his sanction and approval. On the contrary, within the sphere of operation of the civil departments enumerated in s. 54 of the Letters Patent, Ministers are clearly supreme in authority. This, however, does not in the least suggest the possibility of deadlock. The power of the Crown, expressly reserved in the Letters Patent, constituting the office of Governor, to legislate would enable it in case of need to confer administrative authority on representatives of the Imperial Government. In the absence of any failure of duty on the part of the Ministry, on the other hand, it is clear that any interference with the regime legally established by the Letters Patent is open to the most serious objection.

Legislation by the Crown.—The division of legislative power in the Letters Patent is unfortunately of the vaguest character ; Lord Plumer ³

¹ *Parliamentary Paper*, Cmd. 1321, p. 92.

² Correspondence regarding the interpretation of s. 41 of the Malta Constitution Letters Patent (1929).

³ *Parliamentary Paper*, Cmd. 1321, p. 40.

fully recognized this fact, but hoped, when responsible government was in working order, that it would be possible to avoid any friction by tact on either side. The real error, however, lay in the decision, induced by doubt as to the attitude of the legislature, to withdraw a large field of operations entirely from the powers of that body, conferring power on the Crown in Council or the Governor to legislate on these reserved matters. It would, it is clear, have been wiser to follow the Indian model, and to permit legislation on reserved subjects with the permission of the Governor, and to remove from the law courts the power to question any legislation duly assented to by the Crown, even if it dealt with reserved matters. As it is, it would be extremely difficult to decide how far legislative authority could be exercised by the Parliament or the Crown, should the Courts be resorted to. But a more serious objection lies in the fact that legislation on reserved matters must vitally affect Malta, and that constitutionally, as in India, it ought to be proposed in the Parliament, debated and passed there, and, only in the event of failure to pass it, should Imperial authority be interposed. The objection is not theoretical; the practical aspect has been strongly evidenced in the controversy between the Ministry and the Governor over the passing of a measure to facilitate expropriation of land for defence purposes. The Government has secured the passage of a measure for this end, greatly simplifying the existing administrative procedure, in the form of a general enactment, available for all governmental purposes as well as purposes of defence, and it has, naturally enough, claimed that such a measure falls within the general legislative authority of Parliament, and cannot be deemed invalid because *de facto* it would be used for the purpose of facilitating acquisition of land for defence. The Governor, on the other hand, has maintained that the measure deals with a reserved matter, the acquisition of land for defence, on which under s. 41 (1) of the Constitution Letters Patent Parliament has no legislative power. The solution of the impasse proposed by Lord Strickland in a memorandum addressed to the Secretary of State on June 25 is ingenious; it was proposed that the Bill should in due course be reserved for the royal assent, and, when assented to by Order in Council, should at the same time be confirmed under the legislative power as to reserved matters vested in the Crown. The measure would thus be valid for general purposes as a law of Parliament, and for defence purposes, either as such a law or as enacted by Order in Council. The procedure, it is clear, could well be generalized; initiation of legislation could even on reserved matters be left to Parliament and confirmation be accorded by the Crown in Council, avoiding the invidious process of legislation by the Governor or by the Crown, ignoring the existence of Parliament.

Money Bills in New South Wales.—The survival of the Legislative Council, despite the efforts of Mr. Lang's Government while in power to secure its abolition, has not unnaturally been followed by a period of activity, and inevitably this activity has brought the Council into a

measure of disagreement with the Lower House. Early in December 1928 the Council amended rather extensively the Income Tax (Management) Bill, sent up from the Assembly, contending that it could not be held that such a measure fell under the category of money bills. This view was energetically disputed by the Hon. D. Levy, Speaker of the Assembly, on December 6, when he pointed out on the strength of British and State precedent that "no stronger case of infringement of the privileges of this House in respect of money bills has ever been made or attempted than in the Bill now before this Chamber." In fact the amendments were clearly subject to the strongest objection on constitutional grounds, and the Prime Minister recognized that the Assembly would be entirely within its rights in insisting on the matter as one of privilege. He abstained from this action on two main grounds. The amendments were matters of detail, and did not affect the essential principles of the Bill, while to reject them, with the possible loss of the measure half-way through the financial year, would be extremely inconvenient. Secondly, it was proposed next session to secure legislation defining the rights of the Council in respect of money bills, so that immediate action was not essential. The leader of the Opposition suggested that at least the Assembly should assert its position by laying aside the Bill as amended, and by introducing in lieu a Bill embodying the amendments; but the Prime Minister thought that this course would serve no useful purpose. In the end, therefore, the amendments were accepted, but a message was sent to the Council insisting that the acceptance was based on the fact that the amendments did not affect the principles of the measure, and asserting that the Assembly did not surrender any of its undoubted rights and privileges. The net result, of course, must be admitted to be something of a victory for the time being for the Council, for, as Mr. Levy pointed out, the issue involved was not a question of a technical change which, while in theory a violation of privilege, could properly be waived. Such a case had occurred earlier in the session of 1928, when the Assembly on the Speaker's advice acquiesced in certain changes in the Liquor Amendment (Fees) Bill on the ground that they really gave effect to the intentions of the Assembly. It is, however, clear that the continued existence of the Council can only be assured by a definition of its powers, for it will always be open to objection that a nominee body should alter financial measures.

Civil Servants in the Irish Free State.—The hope that the Irish Free State would give effect to the terms of Article 10 of the treaty of 1921, as finally and most authoritatively declared by the Privy Council, has been disappointed. The position of the Free State has remained fixed in the sense that no more would be paid by the Free State to officers retiring from the service than was due under its interpretation of the terms of the article. The justification for this attitude adduced by the Minister for Finance in the Dail on February 20, 1929, is that the interpretation

¹ See *Journal of Comparative Legislation*, Third Series, vol. xi, pt. i, pp. 129-31.

adopted by the Privy Council gives the officers concerned more favourable terms than it was intended by the British and Irish Governments when framing the treaty to accord to them. Assuming that the two Governments failed through bad drafting to express their purpose correctly, it is by no means clear that there is any equity in the British taxpayer being compelled to bear the burden of the difference between the amounts which the Free State is willing to pay and those which must be paid under the terms of the findings of the Privy Council. It does not appear to be alleged that responsibility for the defective expression of what is stated to have been the common intention of the Governments rests rather with the British than with the Irish Government. But, if it is deemed improper that the officers concerned should be given the benefit of the defective wording of the treaty by the Irish Government, it is very difficult to understand how it is proper to place the burden on the British taxpayer. Indeed so surprising was the willingness of the British Government to undertake the burden deemed in the Free State that it was suggested that the issue had not been decided on its merits, but had been compromised in connexion with the negotiations to secure the withdrawal by the Imperial Government of the silver coinage current in the Free State, in order to facilitate the introduction of the specific Irish currency. The connexion of the two issues, however, was denied by the Government of the Free State. But emphasis was laid on the fact that the State had adhered to its determination not to accept the decision of the Privy Council as imposing upon it any additional burden, and that it would persist in seeking the abolition of the appeal to the Privy Council. The termination of the episode is clearly most unfortunate, though it is an appropriate end to a series of grave errors, the careless drafting of the treaty which failed to carry out the purpose of its authors, the error of fact made by the Judicial Committee which cast doubt on its decision in *Wigg and Cochrane's case*,¹ and the effort to secure a reversal of that decision by the Imperial Government, which never offered the slightest real probability of success on legal grounds.

The Copyright Act of the Irish Free State.—A rather unfortunate impression is inevitably raised by the action of the Irish Free State Parliament in its legislation on copyright. The issue was raised by the action brought in 1926 in the High Court of the Free State by the Performing Right Society against the Bray (Co. Wicklow) Urban Council seeking an injunction in respect of the performance by a band engaged by the Council of two items which were copyright under the Copyright Act, 1911. The Council contended that the Act of 1911 ceased to operate on the signing of the treaty of December 1921, and that neither the Free State Constitution nor its legislation on adaptation of enactments sufficed to bring the Act into renewed operation. The High Court was not convinced of the justice of the plea, and ruled in favour of the plaintiffs, but on appeal the Supreme Court reversed the ruling in 1927. This

¹ [1927] A.C. 674.

has naturally necessitated action by the Irish Parliament to secure copyright to authors entitled to it, but the necessary Act has been provided with a clause which in anticipation nullifies any ruling overturning the decision of the Supreme Court which might be given by the Privy Council, from which the Society had duly obtained special leave to appeal. It was in vain that Senator Sir John Keane protested, on July 10, against this provision as unwise, wrongful, and damaging to the national prestige. Mr. McGilligan in reply insisted that it was the deliberate intention of the Free State to get rid of the prerogative to grant leave, or in the alternative to allow it to stand on the understanding that appeals would become fewer and fewer. Now it is perfectly easy to sympathize with the desire to be rid of the appeal, and it is surprising that the Privy Council should have granted leave in view of the fact that the Free State has so unequivocally shown its determination to nullify any decision of the Council overruling the Supreme Court. But the fact remains that the Free State accepted the appeal as part of the constitution promised by the treaty of 1921, and that it is now violating in spirit a compact on the faith of which it was accorded the widest amount of freedom. It is to be regretted that the Conference of 1926 did not see its way to permitting the abolition for the Free State of the appeal. The net result of its retention so far is that no appeal has been allowed to have effect, and that the British Government is saddled through its existence with the payment of a very considerable sum of money to civil servants which, we are assured by both Governments, it was never intended by either that they should receive. It is surely impossible to conceive any Imperial interest served by the prolongation of so anomalous a situation.

New Zealand Citizenship.—Sir Robert Stout has long been known as the most convinced adherent of the doctrine that the powers of the New Zealand Parliament extend even under the existing constitution to punishing offences against the laws of the Dominion committed beyond territorial limits. It is, therefore, very natural that he should have introduced into Parliament in the last session under Mr. Coates's Government a Bill¹ based on the assumption that his view must be regarded as legally tenable. The measure was brought in too late to receive serious consideration, but its features are worth recording. It proposed to define as New Zealand citizens all persons born in the Dominion, and all British subjects, entitled to become residents, after two years' residence, as well as aliens naturalized under a Dominion Statute, who have resided in New Zealand, the Cook Islands or Western Samoa for two years after naturalization. The last requirement seems excessive in the case of aliens who have already before naturalization resided for prolonged periods in the Dominion. Every New Zealand citizen would be liable to be tried and punished in the Dominion for any violation of the provisions of any statute, notwithstanding that the violation took place outside New Zealand, if he were found in the Dominion or one of its

¹ I am indebted to Sir James Allen for a copy of this measure.

territories. The proposal, by the last condition, eliminates one cause of difficulty, namely the question whether a claim could be made for the handing over of an offender against a New Zealand statute, if resident in England, on the plea that he was a fugitive offender. The restriction of liability to cases of violation of statute law is a further effort to render acceptance of the proposal easy. There remains, however, the fundamental question whether such a Bill, even if passed by Parliament, would have any legal effect as regards crimes committed beyond New Zealand territorial limits, unless and until the powers of the Dominion Parliament are extended by Act of the Imperial Parliament. The proposal, it must be noted, raises the issue of extraterritorial power in a perfectly simple shape; it has not attempted to evade the issue by penalizing entry into New Zealand after committing an offence elsewhere, a device which has been effectively used to give validity to Australian customs legislation¹ as well as to the bigamy law of Canada.²

The Extent of Dominion Legislative Power.—Canada again has just raised the issue of jurisdiction in a more practical form by the enactment of an amendment to the Customs Act intended to assist in the prevention of smuggling. Under the Act, if any vessel is hovering within the territorial waters of Canada, any officer may board her and bring her into port. A vessel must stop when required, on pain of being fired upon in default, and no person may throw overboard or destroy any part of the cargo or documents relative to it. If dutiable or prohibited goods are found on board such a vessel, the ship and cargo may be forfeited. Territorial waters for the purpose of the Act include the waters which are part of the Dominion, and waters adjacent to the Dominion within three marine miles, but in the case of ships registered in Canada the extent of waters is twelve miles. The measure naturally did not pass without keen discussion, and both Mr. Bennett, the leader of the Opposition, and Mr. Ernst insisted that, as the law stood, the Dominion had no power of extraterritorial legislation. Mr. Lapointe contended, on the other side, that the legislation of the Dominion to enforce the Halibut Fishery Treaty with the United States gave power to seize vessels on the high seas if violating the rules as to close time, and that it should be assumed that the power thus taken was valid and effective. He relied also on the view of Sir Robert Stout in the famous case of the *Award of the Wellington Cooks' and Stewards' Union*³ and on the decision of the Privy Council in the case of *Cain and Gilhula*,⁴ when it was held that Canada had a right to deport aliens even if that involved a certain measure of extraterritorial constraint. He did not note, however, that Sir R. Stout's view had been rejected by the New Zealand Court of Appeal.⁵ He admitted that the New Zealand Government had felt it necessary to obtain an Imperial Order in Council for the Government of Western

¹ *Peninsular and Oriental Steam Navigation Co. v. Kingston*, [1903] A.C. 471.

² *In re Bigamy Section, Criminal Code*, 27 S.C.R. 461.

³ 26 N.Z.L.R., 394.

⁴ [1906] A.C. 542.

⁵ *R. v. Lander*, [1919] N.Z.L.R. 305.

Samoa, but pointed out that in the case of South Africa the Parliament of the Union had claimed inherent power to legislate, and he revealed the fact that the official attitude of Canada has changed in some measure. At one time the Dominion was eager to press for the formal extension of the power of the Dominions ; at the Conference of 1926 Canada had held the view that she had all necessary authority, and the reference of the subject to further consideration by a Committee in due course was agreed to at the wish of other Dominions. It was hoped that the new Act would give an opportunity for a legal decision. It must, however, be noted that the restricted character of the enactment weakens the value of any finding. It is perfectly possible that a decision in favour of the validity of the Act would merely mean that the power taken fell within the right generally held to exist under s. 735 of the Merchant Shipping Act, 1894, for the Dominion to regulate these ships which are registered in Canada. Moreover the practical value of the measure must be admitted to be diminished by the admission that the Dominion would be powerless to apply the enactment against vessels from Newfoundland, so that smuggling might simply be carried on under a different flag.

Dominion Powers of Legislation for Mandated Territories.—It is interesting to note that the contrast between the New Zealand and South African views of the position of the Parliaments of those Dominions in respect of mandated territories formed the subject of comment in the New Zealand case, *Tagaloa v. Inspector of Police*.¹ The issue there was the validity of a Samoan Offenders Ordinance, 1922, passed to enforce the process, traditional in Western Samoa and resorted to both by the German and the New Zealand administrations, under which refractory Samoans may be ordered to leave their homes and to reside in defined areas. Two Samoans disobeyed an order of banishment in this sense, and were sentenced to imprisonment under the Ordinance of 1922, the validity of which, therefore, was questioned on their behalf. On appeal the Full Court of New Zealand held the Ordinance valid, for reasons which are distinctly interesting. Sim, Acting C.J., expressly admitted that the Samoa Act, 1921, of the Dominion Parliament, under which the Ordinance was passed, could not be upheld as legislation under the Constitution Act, 1852, for the peace, order and good government of New Zealand, nor was this view dissented from by any member of the Court. The majority of the judges, however, were content to accept the validity of the Order in Council of March 11, 1920, made under the Foreign Jurisdiction Act, 1890, by which power to legislate for Western Samoa was conferred on the New Zealand Parliament, while if need be the Imperial Treaty of Peace Act, 1919, might be invoked to justify the Order, which in the usual way purports to be made not merely under the Act of 1890, but in virtue of any other powers vested in the Crown. It seems in fact clear that the Act of 1890 is precisely in point and concludes the matter. But Ostler J. carried the matter much further, for he expressly stated that, if there

¹ [1927] N.Z.L.R. 833.

had been no Order in Council, he would have held the Samoa Act valid as legislation based directly on the assignment to New Zealand of the mandate for Western Samoa, on the same principle as had been adopted by the Appellate Division of the Supreme Court of the Union when it ruled in *R. v. Christian*¹ that the Union had *maiestas* over South-west Africa, although no Order in Council had ever been issued under the Foreign Jurisdiction Act, 1890. It should, however, be noted that in fact, when the Union first began to legislate for South-west Africa the view taken by the Speaker, and apparently by the Government, was that the power to legislate rested on the South African Act, 1909, on the score that legislation for South-west Africa fell legitimately within the category of legislation for the peace, order and good government of the Union.² There was, it is clear, much greater plausibility in this view in the case of the Union as contrasted with that of New Zealand. It would be extremely difficult to contend in fact that the peace of New Zealand requires that power to legislate for Western Samoa should exist while it is easy to believe that the Union requires power to deal with South-west Africa. In the Commonwealth, likewise, power to deal with the territories taken under mandate has been based on the Constitution, and the Treaty of Peace Act, 1919,³ and not on any new creation of sovereignty by the conferment of the mandate by the League.

Law and Constitutional Change.—Special interest attaches to the attitude adopted by Mr. Justice Ostler to the question of the effect on the law of the constitution of the great change which has of late taken place in the relations of the Dominions to the United Kingdom. He pointed out that the older conception of subordination to a central legislative authority had been superseded by the conception of a partnership of independent nations bound together by ties of loyalty to the same King, ties of kinship, ties of common interests, common beliefs, common faith in the future. This had been made abundantly clear by the proceedings of the Imperial Conference, and he considered that the time had come for the recognition of this fact by the Courts, suggesting that a strong argument might be adduced for the desuetude of the Constitution Act of the Dominion on the maxim *cessante ratione legis cessat ipsa lex*. It would follow on this view that the Courts of the Dominions should deny any longer the validity of the Colonial Laws Validity Act, 1865, and the supremacy of Imperial over Dominion legislation, as well as the territorial limitation of Dominion legislation. It is, however, clear that this doctrine is not that of the Courts of the Dominions in their judgments, nor indeed is it desirable that it should be. The proper method to bring practice and law into harmony is clearly legislation, and the difficulties of such legislation were keenly felt at the Imperial Conference of 1926 which accepted the view that the matter must be dealt with only after

¹ [1923] A.D. 101.

² Keith, *War Government of the British Dominions*, p. 263.

³ *Porter v. The King*, 37 C.L.R. 432, 450.

full examination of all the issues, including the vital question of merchant shipping, by experts. The dangers of allowing judicial decisions to ignore laws would far outweigh the convenience ; if the Supreme Court of Canada could hold that the Dominion Parliament was not bound by Imperial Acts, the constitutional safeguards of the Provinces would be undermined.

Dominion Admiralty Jurisdiction.—In another form the issue of the extent of Dominion legislative power is raised by the discussion of the effect of the judgment of the Privy Council in the case of the *Yuri Maru* and the *Woron*¹ by Canadian lawyers.² They tend to the view that the power of any Dominion in regard to Admiralty legislation is restricted definitely by the Colonial Courts of Admiralty Act, 1890, and that no Dominion legislature can confer on a Dominion Court Admiralty jurisdiction beyond that possessed in 1890 by the High Court in England. As against this opinion, which rests on the obvious interpretation of the Colonial Courts of Admiralty Act, must be set the observation of Lord Merrivale in delivering the judgment of the Privy Council that “ what shall from time to time be added or excluded [to the jurisdictional authority of Colonial Courts] is left for independent legislative determination.” It is, of course, true that the observation is *obiter*, because it is not absolutely essential for the determination of the point at issue in the case, but on the other hand it forms part of a very carefully considered judgment arrived at after a very full consideration of all the relevant matter, and it cannot be treated as inadvertent. It must, therefore, normally be interpreted as meaning not less than what it appears to mean. In the context the natural sense to give to it is that Canada—and any other Dominion—has independent legislative authority to deal with Admiralty jurisdiction, ignoring the terms of the Colonial Courts of Admiralty Act, and that the restrictions laid down in that Act have reference only to legislation passed under the authority of that Act. That is the interpretation of the dictum which seems to me the more probable,³ and it is supported by the fact that the Canadian Maritime Convention Act of 1914 has not been successfully impugned so far, and has been generally assumed to be valid. Professor Smith’s interpretation of the dictum⁴ is to the same effect, except that he holds that the authority ascribed to Dominion Courts is subject to the legal limitation that it shall not exceed the extent of jurisdiction from time to time vested in the High Court in England. This view, however, is only valid if it is held that the restriction imposed by s. 3 of the Colonial Courts of Admiralty Act applies to independent legislative action by the Dominions, and this appears to me untenable ; the restriction applies to such legislation

¹ [1927] A.C. 906.

² *Law Quarterly Review*, 1928, p. 422 ; F. R. Scott, 6 C.B. Rev. 787.

³ *Journal of Comparative Legislation*, Third Series, vol. ix, pt. iv, p. 254. So the head-note in [1927] 4 D.L.R. 69.

⁴ *Law Quarterly Review*, 1928, pp. 7, 422.

alone as is passed under the authority given by that Act, but not to legislation passed in virtue of authority possessed apart from the Act. But naturally in legislation it would be most desirable that a Dominion should not go beyond the British limits, for the advantage of uniformity is obvious. The Canadian view, on the other hand, is that the dictum refers only to independent action by the Imperial Parliament, but frankly if this was what the Privy Council meant it could hardly have been expressed more obscurely. It seems much more reasonable to suppose that the Privy Council adopted the perfectly possible view that Dominion legislative authority included full power to define Admiralty jurisdiction, and that the Act of 1890 did not exhaust the field so as to cut down this inherent general power. There is nothing surprising in the fact that the Act of 1890 should hitherto have been thought exclusive ; it is only slowly that the full implications of the doctrine that colonial legislatures are not delegates of the Imperial Parliament have been developed ; as late as 1906 it required the decision of the Privy Council to establish in *Attorney-General for Canada v. Cain and Gilhula* ¹ the right of Canada to use extraterritorial constraint in expelling aliens from the Dominion. Nor until 1920 was it made clear in *McCawley v. R.* ² that the widest power of constitutional alteration had been granted to the Dominions by the Colonial Laws Validity Act, 1865.

The Colonial Laws Validity Act.—It need hardly be said that the whole discussion of Admiralty jurisdiction assumes the validity of the Colonial Laws Validity Act, 1865. As the Imperial Conference of 1926 recognized, if this measure is to cease to apply to Dominion legislation, this can be brought about only by legislation which will be determined upon in due course. Moreover, it must be clearly understood that the validity of that Act was never questioned by the framers of the Canadian Constitution, and that it was by no accident that it has been religiously respected by the Canadian Courts. The framers of the Commonwealth Constitution had advanced, more than thirty years later, to the conception of suggesting—half-heartedly—that the Act should not be deemed applicable to the great federations ; but that suggestion was promptly negatived by the Imperial Government. The High Court of the Commonwealth has repeatedly asserted its application, in a specially interesting manner, in *Hume v. Palmer*.³ In that case the question involved was primarily the issue whether there was a conflict between the provisions of the Regulations for preventing Collisions at Sea, 1911, made under the Navigation Act, 1901, of New South Wales, and the Navigation (Collision) Regulations, 1923, made under the Commonwealth Navigation Act, 1912–20, so that the latter ousted the former in virtue of s. 109 of the constitution. This was held by the majority of the Court to be the case, in virtue of the fact that, though the offences created by the two authorities were much the same, the penalties distinctly differed, and also the tribunals which were to exercise jurisdiction. But the further issue

¹ [1906] A.C. 542.

² [1920] A.C. 691.

³ 38 C.L.R. 441.

arose, whether the Commonwealth regulations were not *ultra vires* as contrary to the Sea Regulations, 1910, issued under the Imperial Merchant Shipping Act, 1894. It was agreed by the Court that the Commonwealth and State regulations alike were invalid if contrary to the Imperial regulations, but it was held that the variation from the Imperial regulations was expressly authorized by the power given by s. 735 of the Merchant Shipping Act to colonial legislatures to repeal provisions of that Act in so far as they affected ships registered in the Commonwealth of Australia regarded as a geographical unit. Starke J.¹ pointed out that the power of the Commonwealth to regulate navigation depended entirely on the provisions of ss. 735 and 736 (as to coasting trade), of the Merchant Shipping Act, taken in conjunction with ss. 51 (i) and 98 of the Constitution, and that, even under these authorities, it was probable that part of the Navigation Act was *ultra vires*, as has indeed been ruled in *Union Steamship Co. v. Commonwealth*.² But in this instance he held that the validity of the provisions as to collisions was secured by the fact that the steamer in question was engaged in inter-state trade, and thus was within the ambit of Commonwealth power; the Act itself by s. 2 (2) makes provision that it is to be construed so as not to exceed the legislative power of the Commonwealth, and the High Court has ruled in *Newcastle and Hunter River Steamship Co. v. Attorney-General for the Commonwealth*³ that the effect of this enactment is to render valid any provision which *per se* is within the power of the Commonwealth, however much it may be involved with a provision not valid.

The Controversy over Garden Island.—The question of repugnancy between local and Imperial legislation was held by Isaacs J.⁴ to arise in the celebrated controversy between the Commonwealth and New South Wales as to the possession of Garden Island. That island formed part of the Crown lands of New South Wales, over which the legislature of that colony received full authority in 1855. In 1865 and 1866 it was dedicated by the local Government for the purposes of a naval depot under the authority of the Crown Lands Alienation Act, 1861, and it continued until 1913 to be used by the Imperial naval forces. By an Imperial Order in Council of October 26, 1899, under the Colonial Fortifications Act, 1877, it was recited that an agreement had been made between the Imperial and Colonial Governments that certain improvements should be made on Garden Island, and a suitable residence for the representative of the Navy on the Australian station should be provided, and that, as soon as the improvements had been carried out and the site of the residence granted in perpetuity for the use of Her Majesty's Navy "in the same way as Garden Island has been," the Imperial Government would surrender to the Colonial Government certain Ordnance Reserve and other lands. The Order then proceeded to vest, in consideration of the premises, the lands referred to in the Colonial Government. When

¹ 38 C.L.R. 462-4.² 36 C.L.R. 130.³ 29 C.L.R. 357.⁴ 38 C.L.R. 74, 86-121.

the Imperial Government transferred to the Commonwealth the control of naval defence, the Commonwealth took over Garden Island and claimed to have the right to make use of it for defence without any payment to New South Wales, which, accordingly, brought a suit for possession, after the Minister administering the Crown Lands Consolidation Act, 1913, had purported under s. 25 to revoke the dedication of Garden Island, originally made under the Act of 1861. The power to revoke such dedications had been first taken under an Act of 1884. For the Commonwealth it was claimed that the recital of the perpetual dedication in the Order in Council was equivalent to a legal enactment which overrode any colonial legislation repugnant to it, and left the possession in the Imperial Government which had authorized the Commonwealth Government to make use of the island. Isaacs J. adopted this view, but it was not accepted by the other justices, though Higgins J.¹ held that the attempted revocation was ineffectual, because it had not been carried out precisely as the statute required. On appeal the Privy Council² upheld the decision of the majority of the Court below, nor does it appear possible to dispute the conclusive character of the reasoning. The recital in the Order in Council was clearly not an enactment; if it had purported to be, it would have been invalid, for the Colonial Fortifications Act gives no power to deal with any lands save those disposed of by the Order. All that can be said for the Commonwealth rests on equity alone; the reference to perpetual dedication in the Order shows clearly the purpose of the parties at the time, but there is a complete difference between the position of a private person and a State; the executive government cannot bind the legislature, and the Act of 1884 gave an unfettered power of revocation of grants, which the Minister in 1923 was legally competent to exercise, irrespective of any prior agreements. The case illustrates the unfettered power of colonial legislatures to confiscate or alter agreements, if in the exercise of their complete discretion they deem such action necessary in the public interest. "The legislature," as Higgins J. observed,³ "has power to break faith; much more has it power to refuse to carry out a promise made by the Government without authority." But he was careful to note that the case of the Commonwealth in equity was not strong; what was granted to the Imperial Government for the Imperial Navy could not be transferred by the latter to the Commonwealth for its Navy without the assent of the State as a matter of right. This dictum is clearly sound; the various aspects of the Crown are distinct in fact and in law. Indeed, what is surprising is that the appeal should have been brought after the conclusive judgment of the High Court.

Dominion Companies and Provincial Legislation.—Another important decision⁴ of the Privy Council illustrates the difficulties which the

¹ 38 C.L.R. 127-30.

² 45 T.L.R. 216.

³ 38 C.L.R. 74, 126.

⁴ *Attorney-General for Manitoba v. Attorney-General for Canada*, [1929] A.C. 260; 36 Man. L.R. 583.

Canadian provinces have to face in seeking to protect the people of the provinces, as a result of the overriding effect of Dominion legislation. Manitoba has been anxious to protect residents in the province from the temptation to invest in shares in ill-designed, ill-equipped, and ill-conducted undertakings, and for that purpose a Sale of Shares Act was duly passed, under which restrictions were imposed on the sale of shares by any company, wherever incorporated, no sale being permitted without a certificate and licence from the Commissioner. This Act was pronounced *ultra vires* in so far as it affected Dominion companies by the Supreme Court in *Lukey v. Ruthenian Farmers' Elevator Co., Ltd.*,¹ and an effort was made by the province in the Municipal and Public Utility Board Act, 1926, to overcome the difficulties of the former measure. The latter Act, like the former, was so carefully framed as to offer no likelihood of injustice, and the legislation was admittedly in no sense differential in its application to Dominion companies. Nevertheless, the Court of Appeal of Manitoba and the Privy Council alike have had no difficulty in holding that the measures are both invalid, in so far as they operate to forbid the sale by a Dominion company of its shares or their allotment to subscribers. It was in vain that it was urged for Manitoba that to pronounce the statutes invalid would enable a body of men who wished to escape the beneficial restrictions of the province to defy its authority by securing Dominion incorporation; that the Dominion power to invest an entity with capacities was quite distinct from authority to allow their unrestricted exercise; and that Dominion legislation ought not to be allowed to cover fraud. Their Lordships set against these considerations the rule enunciated in the well-known cases of the *John Deere Plow Company*² and the *Great West Saddlery Co.*³ that a provincial Act may not impair the status and essential capacities of a Dominion company, and that it was a clear impairment of status and capacity, if a Dominion company were not permitted the essential power of raising capital without provincial authorization. The reasoning is doubtless conclusive, but the result is far from satisfactory; the structure of the British North America Act in this, as in many other points, is too archaic to accord with the developments of modern commercial methods, of which the fathers of federation could have no conception. Incidentally the Privy Council enunciated the recognized doctrines that the purpose of the legislation impugned was immaterial, the effect alone being relevant, and that the effort in the later Act to effect the purpose by applying its rules to those natural persons through whom a Dominion company must act was invalid, on the score that what may not be done directly cannot be carried out indirectly.

British Nationality and Illegitimate Children.—The unsatisfactory drafting of the British Nationality and Status of Aliens Act, 1914, even as amended, is responsible for the raising of the question⁴ whether the

¹ [1924] S.C.R. 56.² [1915] A.C. 330.³ [1921] 2 A.C. 91.⁴ *Law Quarterly Review*, xliv. 151.

illegitimate child of a British mother born outside the British Dominions can acquire British nationality by reason of birth in some place where the Crown exercises extraterritorial jurisdiction. The suggestion that any doubt exists in the matter is due to the common error ¹ of thinking that the proviso in s. 1 of the Act of 1914 is a substantive clause conferring British nationality on the "child of a British subject" born in a place where such jurisdiction is exercised; if this were so, it would be arguable that British nationality was conferred thus on the illegitimate child of a British mother, if the child were born in Egypt or China. But the proviso is not an enacting clause in the sense suggested. It is a clause explaining one of the conditions on which a child born outside of the British Dominions can acquire British nationality, namely the fact that his father, being a British subject at the time of the child's birth, was himself born within the allegiance; the proviso makes it clear that birth of the father in such a place as Egypt fulfils the condition. The illegitimate child, therefore, derives no aid from the proviso at all, and it remains clear that nothing but birth within the Dominions can confer on it the status of a natural-born British subject. The error doubtless has been helped by the use of the term "child" in the Act; "son" alone is meant, as the context proves absolutely, but the use of the wider term is unfortunate.

¹ See Dicey, *Conflict of Laws* (1927), p. 167.

NOTES.

International Congress of Comparative Law.—The last annual meeting of the International Academy of Comparative Law, held at The Hague in August 1929, was devoted mainly to considering the question of convoking an international congress. A report on this subject was presented by Professor Édouard Lambert of Lyons. The Academy adopted the following recommendations made in Professor Lambert's report as to the main principles which would form the basis of such a congress.

1. The Congress should be considered as the first of a series of congresses to be held at regular intervals.

2. It was to be understood that by comparative law was intended not any special branch of law but the method by which legal science adapts itself to the necessities of an international community which has become conscious of the solidarity among its members. The international character of this congress and of those which should follow must be strongly emphasized.

3. All associations of persons interested directly or indirectly in the international life of the law ought to be approached and invited to send delegates or observers to the Congress.

4. Seeing that the study of comparative law is inseparably bound up with the study of law as a branch of social science, the collaboration was to be invited both of representatives of the other social sciences—comparative history of law, legal sociology, legal philosophy—and also of economists and commercial, industrial or professional organizations and their legal experts.

5. The natural task of the next Congress as a whole (apart from the work of special sections) and of the Congresses to follow was to make itself an organization adapted to stimulate among lawyers as such the sense of international solidarity.

Just as the German *Juristentag*, or the meetings of the American Bar Association had done a great deal to develop the national consciousness of law, so, in like manner, the function of these Congresses was to develop an international consciousness. Lawyers must become "internationally minded."

Professor Lévy-Ullmann of Paris presented a report as to the special sections into which the Congress might be divided. Upon his recommendation the following list of sections was accepted on the understanding that the list was merely provisional and subject to modification at the

suggestion of organizations interested : (i) General theory of law, legal sociology and philosophy of law ; (ii) Comparative history of law and legal ethnology ; (iii) Private international law ; (iv) Comparative commercial law ; (v) Comparative civil law ; (vi) Comparative procedure, civil and commercial ; (vii) Criminology, criminal procedure and comparative criminal law ; (viii) Public international law ; (ix) Political science and comparative constitutional law ; (x) Comparative administrative law and comparative administrative and financial science ; (xi) Law of carriers and communication (carriers by land, sea, rivers and air, and wireless telegraphy) ; (xii) Intellectual property ; (xiii) Special rights of trade organizations, political economy and social and industrial legislation.

In regard to ways and means, Professor Lévy-Ullmann, who had been invited to study the subject, reported that in his opinion before further decisions were taken an attempt should be made to discover whether sufficient support would be forthcoming to make the Congress a success. It was decided to invite Professor Édouard Lambert to get his report printed, together with a summary of the discussion at the meeting of the Academy. This report, accompanied by a *questionnaire*, could be sent to all the organizations interested, and when the answers had been received it would be easier to judge whether such a scheme for periodical congresses of this character was practicable.

Professor Lambert's brochure has just appeared under the title *Le rôle d'un congrès international de droit comparé en 1931*. (Giard, Paris.)

Lord Astor's Bill, Lord Haldane and the Scots Law.—We have no idea as to the prospects of the " Wills and Intestacies (Family Maintenance) Bill," but the chances of private members' Bills in general are slender. With its purpose we have great sympathy and we wish it were possible to go further in the same direction. It needs a stout heart to defend the existing law, under which a rich man with a wife and six children, or even a dozen, may leave his whole estate to a Dogs' Home.

In the Debate in the House of Lords on May 16, 1928, on Lord Astor's motion to appoint a Select Committee, Lord Astor gave some strong illustrations from real life. In one case a man, who had deserted his wife to live with another woman, and had been compelled to pay an allowance to his wife, left at his death his whole estate to the paramour and his widow had to be supported by the rates. In another case, a man who left £500,000 had, by an old will executed when he was a poor man, made for his widow a modest provision of 35s. a week, and with this she had to be content, as the residue was disposed of.

In the countries which follow the civil law such things cannot be. The widow and children are fully protected. For example, in France, if a man leaves three children or more, he can dispose by will only of one-quarter of his estate, and that is after deduction of his wife's share under the matrimonial regime applicable.

But we do not need to cross the Channel to find legal restrictions on the caprice of testators. In Scotland the widow or widower is entitled to one-third of the moveable estate of the predeceasing consort, or to one-half if there are no surviving children. And children are entitled to one-third or one-half of the moveable estate of a deceased parent according as to whether the other parent is living or not. These rights to *jus relictæ* or *jus relictî*, as the case may be, and to *legitim* are indefeasible by will.

This tripartite division of the moveable estate into wife's part, bairns' part and dead's part is very ancient. It is given in the *Regiam Majestatem* of the early part of the thirteenth century, but is doubtless much older. In fact, it is pretty safe to affirm that this scheme of division goes back to the misty period when wills were unknown. In their origin *jus relictæ* and *legitim* were not rights of succession but rights to a share of a family fund, and they are, even now, more than rights of succession, because they cannot be defeated by will. It is pretty certain that the system came to Scotland from England, where a similar system obtained for many centuries and lasted in the Province of York till 1696. The ultimate origin of the system is obscure and the legal historians are very chary of expressing an opinion.¹ It used to be gaily referred to the Roman law, despite the discouraging fact that the Roman law had nothing like it, for it knew nothing of *jus relictæ* and the *legitima portio* resembled *legitim* only in being indefeasible. It is much more likely that the tripartite division came to England from Normandy, and the arguments in favour of this view have been well marshalled in a recent study of the subject.² But, whatever its origin, the tripartite scheme is firmly established in Scotland. There could be no better evidence of this than the opinion of Professor E. M. Wedderburn, Professor of Conveyancing in Edinburgh University, who writes in an introduction to Mr. Gardner's book: "The special care with which Scots law has provided against harsh and unconscionable wills has for long been regarded with affection by lawyers and laymen alike, and the legal rights of spouses and children may not be uprooted without doing violence to their feelings."

It is true that *legitim* and *jus relictæ* may be barred by antenuptial marriage-contract. In the debate on May 16, 1928, in the House of

¹ Vinogradoff suggests that it goes back to the period before the dispersion of the Aryans (*Historical Jurisprudence*, i, p. 274).

² Gardner, J. C., *Origin and Nature of Legal Rights of Spouses and Children in Scottish Law of Succession*. (Green, Edinburgh, 1928.) The classical sources of the old Norman law are silent, and Pollock and Maitland reserve their opinion. Brunner, replying to them, suggests that the reason of this silence is that at the date of the *Très Ancien Coutumier* wills and succession were already the affair of the bishop. He cites cogent analogies to the system from Brittany and from the old city laws of Sicily. (*Zeitschrift Savigny-Stiftung*, xix. 107, *Germanistische Abteilung*. Cf. Note by Pierre Hevin on Art. 424 of the *Coutumes de Bretagne*, v. 3, p. 32 of ed. 1748; R. Caillemet, *The Executor in England and on the Continent in Select Essays in Anglo-American Legal History*, vol. iii, p. 754; Bateson, Mary, *Borough Customs*, 2, p. xcvi.)

Lords, Lord Haldane was inclined for this reason to minimize the value of the legal protection given to the surviving spouse and the children. According to *Hansard*, he said: "It almost never happens when people marry with any substantial property that these rights are left intact. Every marriage-settlement has a common form put in, a renunciation of *jus relictæ* on the part of the wife and exclusion of *legitim* on the part of the children."¹

But, with great respect, Lord Haldane's argument does not seem to be at all conclusive. Why are antenuptial contracts so common in Scotland? Surely because of the existence of *jus relictæ* and *legitim*. If these rights were barred by provisions which were of derisory amount it would be another story. But this, we submit, very seldom happens. Persons about to marry are, as a rule, well disposed to each other, and they have no grievances against their contingent children. Moreover, their legal advisers tell them what is the proper thing to do in view of their circumstances and expectations. In the vast majority of cases the provisions made for the surviving spouse and for the children are quite reasonable. The result is, on Lord Haldane's own argument, that the widow and children of well-to-do men are generally provided for by settlements which cannot be changed by the caprice of a testator. Moreover, in Scotland, as elsewhere, marriage is by no means confined to people with "any substantial property." It happens constantly that people rush upon that state when their financial position is highly precarious. But of these improvident ones a good number leave property at their death, and their wives and children are protected by the law which gives them *jus relictæ* and *legitim*. Between the two, the hard cases, such as those which Lord Astor cites, are, to say the least, much less likely to happen in Scotland than in England. It is fair to say that hard cases do occasionally happen in Scotland when the marriage contract gives a power of appointment to the spouses or to one of them.² We prefer the Scots system to Lord Astor's Bill, but we suppose public opinion is not ripe for so drastic a change.

In a good many countries where the common law prevails the unrestricted freedom of willing has been felt to be unjust. Legislation to secure some provision for a widow and children is in force in New Zealand, in some of the States of Australia, and in a good many of the United States of America. Lord Astor's Bill is based on the New Zealand model, but makes important modifications.

In the *Law Quarterly Review* for July 1929 there is a timely article by Mr. S. A. Wiren, giving the provisions of the New Zealand Family Protection Act, 1908, as amended in 1921 and a review of the cases upon it.³

The New Zealand Act gives the Court a wide discretion to vary a

¹ *Hansard*, 1928 (Lords), v. 71, p. 47.

² See Ramsay, 12 *Scots Law Times*, 654.

³ L.Q.R. XLV, 378.

will which does not make "adequate provision for the proper maintenance and support of the testator's wife, husband or children." The Court may attach such conditions to the order as it thinks fit and may refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the Court, to disentitle him to the benefit of the Act.

The two most instructive cases are *Allardice v. Allardice*, 29 N.Z.L.R. 959, affirmed by P.C. [1911] A.C. 730, and *Allen v. Manchester* [1922], N.Z.L.R. 220.

The Act is not to empower the Court to make a new will but to alter a will only so far as to secure proper maintenance to wife, husband or children. But proper maintenance does not mean a mere eleemosynary provision. The allowance may be made by periodic payments properly secured or by a lump sum. In *Allen v. Manchester*, Salmond J. said that by far the most numerous class of cases were those of small estates in which the applicant was competing with others who had moral claims upon the testator. Where the estate is a large one the Court has the more difficult duty of determining the absolute scope and limit of the moral duty of a wealthy husband or father to make testamentary provision for the maintenance of his wife or children.

It is always urged in opposing legislation of this kind that it would lead to a vast amount of litigation, and we have thought it worth while to inquire as to the New Zealand experience. The Under-Secretary of Justice has been kind enough to inform us that the total number of applications filed in the Supreme Court for the ten years ending December 31, 1928, was 503. In view of the population of New Zealand, this does not seem a very formidable figure.

It has been argued that a testator when he makes his will ought to be able to ensure that it shall be secure from attack on the ground that the provisions made for his family are inadequate. To meet this difficulty Lord Astor's Bill contains clauses which are decidedly ingenious. Proceedings are to be barred where the will makes provisions of certain specific amounts or shares of the estate. But we do not like the clause which altogether bars proceedings by an adult child except by special leave of the Court, and as to this we prefer the New Zealand model. The tendency in New Zealand is not to grant allowances to adult sons on the ground that if they are able-bodied and not thriftless they can support themselves. Unhappily this is less true in England than in New Zealand. And if sons cannot support themselves and their father's estate is adequate, it is surely better that they should be maintained out of that estate than at the cost of the community. We regard the clause of Lord Astor's Bill giving power to contract out as a distinct blot on the Bill. The New Zealand model which forbids contracting out is in our opinion better. Within a family it is often very difficult for a wife or for children not to fall in with a suggestion made by its head. In the hope of better provisions being made for them by will

they might be induced to surrender for a very inadequate consideration their right to take proceedings, only to find in the long run that they were cut out of the will or insufficiently provided for in view of the testator's means.

F. P. W.

Professors of Roman Law, Old Style and New Style.—Opinions will always differ as to the importance of Roman law in the legal curriculum.

In "civil law" countries, where much of the modern law can be directly traced back to Rome, it is natural to lay great stress on the study of Roman law. It affords the indispensable historical background.

In "common law" countries the study of Roman law as a part of the preparation of practical lawyers has to be justified upon other grounds.

In the United States it has fallen on evil days. So far as we can discover it is no longer compulsory in any of the law schools, though we have not found any definite statement to that effect in the excellent *Bulletins* issued by the Carnegie Foundation.¹ The Index to the last of these has no title "Roman Law," and the only reference under "Civil Law" is to Quebec. Some of the American law schools have dropped Roman law altogether, others retain it as an optional luxury, and others, again, have relegated it to the preliminary "college" course, where it struggles for existence among a host of elective courses.

In England Roman law holds its own, but, apart from courses for honours, and for higher degrees, the teaching hardly goes beyond the "weak and beggarly elements."

Professor Leopold Wenger's little book on the present state of the subject—what has been attained, and what is to be aimed at—will give professors of Roman law plenty to think about.²

It is a brilliant résumé of the researches and investigations of recent years, and is full of valuable indications of the newest "literature." The professor of Roman law of, let us say, half a century ago led a singularly sheltered life. Events in the world around him left him untouched. Kingdoms might rise and fall, but it made no difference to Roman law. If he wrote a book legislators and judges did not rush in to make it out of date. His materials were all there, and they suffered no change or, at any rate, very little change. It is true that the discovery of Gaius in 1816 had been a bomb, but things had settled down again. The higher criticism had hardly begun to shake his faith in the integrity of the texts.

If he could read such a book as Professor Leopold Wenger's would he envy his successors, or would he congratulate himself on having lived in a golden age?

The fields which Professor Wenger suggests for the activities of his

¹ "Training for the Public Profession of the Law," *Bulletin* No. 15, 1921; "Present Day Law Schools in the United States and Canada," *Bulletin* No. 21, 1928.

² *Der Heutige Stand der Römischen Rechtswissenschaft, Erreichtes und Erstrebtes*. Beck, München, 1928, pp. 112, 5-10.

younger colleagues are so many and various that they might make the boldest heart quake.

To begin with, that professor of the present day must by no means rest satisfied with the texts of the *Institutes* and the *Digests*. They have been much faked and the "classical" jurists are often made to say things which would have shocked them profoundly. There is a vast amount of learning about interpolations and, more generally, about the way in which the Roman law was modified, whether at Berytus or elsewhere, between the classical period and the Byzantine.

In the next place, we cannot any longer look upon the Roman law as an isolated system. It is a part of a "culture" which grew up all around the Mediterranean, and many influences went to its making. In order to understand it we must see it in its relation to other systems. The Greek, Syrian, Babylonian, Hittite, Sassanide, Jewish, are perhaps the most important, but when our young professor is pretty well acquainted with them he ought not to neglect ancient Egyptian law, or the early law of Southern Arabia. And it is for his benefit, among others, that an army of workers in England, France, Germany, Italy, Norway, Egypt and even Russia are engaged in deciphering thousands of papyri, many of them fragmentary, and tens of thousands of potsherds. Glimmers of light upon Roman law may be hoped for here.

And it goes without saying that considerable knowledge of early religion and a sound grasp of the economic situation at all the critical dates in the long history will be required.

The old professors of Roman law, with few exceptions, confined their studies pretty much to the private law. But the public law and the economic history must receive much more attention. And one wide and much neglected field is the dark period between Justinian and the early Middle Age.

The young professor must look before and after. With the aid of all the historical materials and behind that with the help of the archæologists, and, no doubt, also, aided by much private speculation, he must try to grope his way back to an early Indo-Germanic law. And, as to the future, he can do his best to promote the growth of a new and better *jus gentium*.

Professor Wenger opens, indeed, vistas down many corridors as yet dimly lighted. It is clear that no single man, were he a Mommsen or a Vinogradoff, could follow them all. Roman law, if it includes all this, will have to be split up among many specialists. Knowledge must be increased and progress, as Professor Wenger admirably shows, has been made during the last decade or two in all these directions.

It is highly desirable that young men of adequate learning and zeal should undertake these labours, and we wish there were more volunteers. But in law schools, where there is but a single professor of Roman law, it is probable that he will have to continue to "narrow his mind." And is there not, perhaps, a danger of too much learning?

The old Romanists were, most of them, first and foremost, *lawyers*. This was more particularly the case in Germany, where, before the B.G.B., so much Roman law was actually in force. The writers of *Pandekten*—Windscheid and the rest—wrote for lawyers. Their books were thumbed by the practitioners. They probably knew none too much about Greek law, and they were altogether too early for the Sumerians. But, *en revanche*, they knew their way about the texts of Roman law, and, what was much more, they had mastered its method. Their books very often supplied the solution to the legal problems of daily life. And, when they did not actually solve the problem, they showed the way in which the correct solution was to be found. Let us by all means have learned legal historians and comparative jurists and legal philosophers, but let us keep a corner for the Roman lawyer of the old style. There is room for him yet, though he may not be a papyrologist or a palæographer or an archæologist. It may be that the case of some professors of Roman law is almost as bad as that of Charles Lamb, who said, "I have most dim apprehensions of the four great monarchies, and sometimes the Assyrian, sometimes the Persian, floats as *first* in my fancy." Even so, it would not mean, necessarily, that they ought to be hurried to the lethal chamber.

F. P. W.

Income-tax.—The Director of the Legislative Reference Service of the Library of Congress, Mr. H. B. H. Meyer, has presented to Congress a summary of the income-tax of Great Britain, including a description of other inland revenue taxes. The work has been carried out with the thoroughness characteristic of these investigations. In a preparatory letter to the Chairman of the Joint Committee on Internal Revenue Taxation, the Chief of the Division of Investigation, Mr. L. H. Parker, makes a comparison between the law of the United States and the United Kingdom. So far as the amount of the tax is concerned, he finds that the British rate is proportionately higher than the United States rate on similar incomes. For example, a man with an earned income of \$7,000 in Great Britain pays about twenty-one times the tax he would pay in the United States. It is observed, however, that the disproportion in the rates on the small incomes is, doubtless, somewhat mitigated by the different purchasing power of the money in the two countries.

In the United States, the income of husband and wife can be taxed separately, so that the surtax rate and the total tax can be reduced seriously. The result is that in the United States there is opportunity for tax evasion by the transfer of income-producing property to a spouse, which does not exist in Great Britain.

In the United Kingdom, the taxpayer merely returns his total income with claims for exemptions, credits and allowances, the tax being then computed by Government Agents. In the United States, the taxpayer is required also to compute the tax as well as the income. "In spite

of this fact, however," Mr. Parker observes, "an actual examination of the British income-tax forms is disappointing as to their simplicity." Finally, he concludes, "While it appears that in many instances the British system is theoretically more sound than ours, it is nevertheless apparent that there is great need in both countries for the simplification of these income-tax systems, in order that they may be understandable by the ordinary citizen and business man."

Succession Law of Native Christians in Syria and Egypt.—Ottoman practice, based upon the provisions of the Hatti Hamayun of 1856, has long recognized the jurisdiction of the Communal Ecclesiastical Courts of the Native Non-Moslem Communities (Christian and Jewish) in matters relating to the succession to members of the Communities. This jurisdiction, however, existed only if all the heirs consented thereto and (*semble*) were all Ottomans and members of the Community whose Courts were involved. If these conditions were not fulfilled, jurisdiction belonged in all cases to the Moslem Religious Courts, which of course applied Moslem Law. In practice, therefore, the application of Moslem Law to the Successions of Christians came to be of common occurrence, and the Christian, *i.e.* Byzantine Law of Succession, fell into desuetude, at least in the outlying provinces of the Empire.

In Palestine the matter has been regulated by statute since the British Occupation,¹ but in Syria and Egypt, where no statutory provision has been made, the older practice may be supposed still to regulate the situation. It has, however, recently been seriously challenged. In Syria a conflict has arisen upon the question between the Court of Cassation and the Court of Appeal. In the case of the succession of a deceased member of the Greek Catholic Community, the Court of Appeal of Aleppo has held, notwithstanding the contrary decision of the Syrian Court of Cassation, that succession to native Christians is necessarily governed by Christian law, which in the particular case was held to be the Byzantine law. The Ottoman practice as a result of which Christian succession came usually to be governed by Moslem law, was held to be an abuse having no legal authority.² It must be admitted that this view is novel and surprising, and its historical basis is dubious. It has not, however, lacked support. A learned writer in the columns of the *Gazette des Tribunaux Mixtes* in Egypt points out that a verse of the Koran expressly provides that Christian laws are to be applied to Christians (*Koran*, chap. v, ver. 51). Another writer in the same periodical presents the law to us in a very embarrassing form. He admits the practice, frequently confirmed in Egypt, that non-Moslem Courts of personal status have jurisdiction in matters of succession only by consent of the heirs. But he contends that the civil legislation of

¹ Palestine Order in Council, 1922, Arts, 51, 53, 54. Succession Ordinance, 1923, ss. 2, 6-9.

² For the successive judgments in this case see *Gazette Trib. Syr.*, iii., pp. 906 ff., 957 ff.; *Chunet*, 1929, pp. 165 ff.

Egypt, and in particular Art. 54 of the Native Civil Code, must be interpreted as making Christian law alone applicable to the succession to deceased native Christians. The resulting situation is, as he remarks, "vraiment embarrassante," and should, in his opinion, be regulated by legislation.¹

A Question of a Piano in Byzantine Law.—"M." and Mme. "G" were married in 1911. They were both members of the Orthodox Church, and upon their marriage a dotal contract was drawn up according to which the furniture of the conjugal home was declared to be part of the dower and valued at £E.250, as also a piano valued at £E.39. Unfortunately, things did not go well with "M. G." and his judgment creditor put in an execution in 1923. Madame "G." then commenced proceedings in the Orthodox Court, claiming back her dowry *propter inopiam mariti*. In 1924 the Court gave judgment in her favour, finding that "G.'s" unfortunate speculations had swallowed up all his private property. This judgment proved, however, of no assistance to Madame "G.," against the execution already levied. Subsequently "G." arranged matters with his creditors, the execution was raised, and a bill given for the debt. The bill was, however, dishonoured, and in 1926 H. again obtained judgment against "G." and again levied execution. Madame "G." opposed execution, pleading the judgment of the Orthodox Court restoring the dower, and, when the Mixed Court of First Instance declared against her, she appealed. In the Court of Appeal she won her case.²

The jurisdiction of the Orthodox Court to hear the suit of Madame "G." had been questioned on the ground that the parties were Greek subjects, and not amenable to the Egyptian Religious Courts. This plea was, however, rejected, it appearing that "G." had in the dotal contract declared himself to be Ottoman. Once the jurisdiction was admitted, the case gave little further difficulty. The Byzantine law applicable undoubtedly gives to the husband the property in the objects included in a *dos æstimata* (*proix diatetimeemene*)³; but the wife retains her right to claim their restitution. "If the fortune of the husband is so much lessened as to imperil the dower, the wife has a right, even while the marriage exists, to claim it back, she being under an obligation towards her family to make proper arrangements for its safety."⁴

The nature of the right to recover in such a case is similar to that which accrues on the dissolution of the marriage, and as to this the provisions of Justinian's law *De jure dotium* are clear: *Mulierem in his vindicandis omnem habere post dissolutum matrimonium prærogativam, et neminem creditorum mariti, qui anteriores sunt, posse sibi potiore causam in his per hypothecam vindicare*.⁵ So far, therefore, the wife's right must

¹ *Gaz. Trib. Mixt.*, xix., pp. 67, 68.

² *Gaz. Trib. Mixt.*, xix., No. 42 (April 10, 1928).

³ Karavokyros, *Code du droit de famille*, Arts. 171, 180.

⁴ Νομολογία τῶν Ὀρθοδόξων Πατριαρχείων, p. 437.

⁵ 5.12.30, Cod., *De jure dotium*, quoted in the judgment.

prevail over that of the judgment creditor of the husband in respect of the execution levied subsequent to the decision of the Orthodox Court. As to the objects affected by that decision, some doubt might exist, and an inquiry on this point was necessary. But the piano was specifically mentioned in the dotal contract, and there could, therefore, be no doubt that this was not liable to execution on the part of the husband's creditors.

This case is an example of the not infrequent application of Byzantine law in Egypt. I am credibly informed that in Palestine recourse is sometimes had to this right of the wife to restitution of the dotal property *propter inopiam mariti* in more doubtful circumstances. Even though there is no formal marriage contract, the Orthodox Court is prepared to hand over to the wife the furniture of the conjugal home on a mere *mazbata*, or declaration by the Mukhtar of the village or quarter that the objects form part of the dower, and thus an impending execution by the husband's creditors is frustrated. If this be so, the proceedings must often be little better than a fraud upon the creditors.

F. M. G.

Jurisdiction of the Mixed Courts in Egypt.—Attention has been drawn more than once in this *Journal* to the decisions of the Mixed Courts as to the extent of their jurisdiction. Art. 9 of Title I of the Decree of Organization of Mixed Suits gave to the new Courts jurisdiction in all civil and commercial suits between "Natives" and "Foreigners" and it early became the established rule that for the purpose of this provision the word "foreigner" was to be interpreted as including all non-Ottomans and not as restricted to subjects of States which had capitulations, and had adhered to the Convention by which the Courts were created. When soon after the establishment of the Mixed Courts Bulgaria became a State independent of the Ottoman Empire, no difficulty was experienced in including the natives of the new State, though ex-Ottomans, within the term "foreigners." As a result of the war the number of foreign residents in Egypt who were subjects of States not having capitulations much increased, and further, since Egypt herself was detached from the Ottoman Empire, Turks, as also subjects of the new States which arose out of the ruins of the Empire, Palestine, Syria, Iraq, Hedjaz, became strictly speaking foreigners from the Egyptian point of view. Having regard to the previous trend of the decisions it seemed likely that the Mixed Courts would now assert jurisdiction in suits between Egyptians and the subjects of these States, most of whom were of course previously Ottoman subjects, and several decisions in this sense were in fact given. At this point the Egyptian Government took action. It sought to limit the Mixed jurisdiction by specifically enacting that the civil and penal jurisdiction of the Native Courts previously in terms limited to suits between "natives" should be exercisable as regards all foreigners who are not freed therefrom by treaty, convention or custom (Decree

Law, March 27, 1929). Foreigners not subjects of capitulatory States could not claim any treaty in their favour, and there was some anxiety amongst them as to whether they might find themselves henceforth excluded from the Mixed Courts in their disputes with Egyptians.

The whole question has now been finally dealt with by a decision of the Mixed Court of Appeal sitting in plenary session as a Court of Cassation in the case of *Sursock v. Khayyat* (May 3, 1929). On the one hand, the Court maintains its previous view that subjects of States not having capitulations are foreigners for the purpose of Mixed jurisdiction, and this notwithstanding the Decree Law above mentioned. Such persons have not, indeed, any treaty in their favour, but they are able to rely upon custom established by the current series of decisions of the Mixed Courts by which jurisdiction has been asserted over them. On the other hand, Turks and ex-Ottomans are not to be regarded as "foreigners" for the purpose. No custom has been created in their favour; as regards them, therefore, the Decree Law is operative. Henceforth, therefore, the jurisdiction of the Native Courts will be admitted in suits between Turks, Palestinians, Syrians and the like and Egyptian natives, but suits between all other foreigners and Egyptians will continue to be brought in the Mixed Courts.

F. M. GOADBY.

Russian Subjects in Egypt.—By decision of the Council of Ministers, October 11, 1923, the Egyptian Government declined any longer to recognize the Russian diplomatic and Consular representation established in Egypt. Russian subjects in Egypt are, therefore, in the position of foreigners not having capitulatory rights, and the Mixed Courts have on several occasions recently been called upon to determine the legal consequences of this situation.

(a) *Mixed Jurisdiction over Russians in Civil Suits.*—The Decree of Organization of Mixed Suits provides (Title I, Art. 9) that Mixed Courts shall have cognizance of civil and commercial suits between foreigners of different nationality. The assumption, of course, was that suits between foreigners of the same nationality would be instituted in their respective Consular Courts.

The Decree of Reorganization of Native Courts provides (Art. 15) that Native Courts shall have cognizance of civil and commercial suits between natives (*i.e.* Ottomans). Russian subjects are certainly not natives. According, therefore, to the words of these Decrees, neither the Mixed nor the Native Court is competent as regards a suit between two Russians.

Old principle and present practice in some countries refuse to foreigners access to the national Courts for the purpose of determining disputes between themselves.¹ But such a principle could have no application

¹ Thus, in principle, the French Courts are not obliged to take cognizance of disputes between foreigners.

in Egypt. It is, indeed, expressly provided by Art. 9 of the Mixed Courts Decree above cited that Mixed Courts shall have jurisdiction in actions relating to immoveables between foreigners of the same nationality.

It would, therefore, be not unreasonable notwithstanding the limiting words of Art. 9, that the Mixed Courts should assume jurisdiction as between foreigners of the same nationality even in ordinary civil and commercial suits if such foreigners have no Consular Courts to which to resort.

This view is favourably put forward in an article in a recent number of the *Gazette des Tribunaux Mixtes*¹ commenting upon a decision to the contrary.

In the case in question² the Mixed Civil Court of Cairo held that Mixed Courts were not, according to the terms of the Decree, Courts of General Jurisdiction for foreigners and referred the litigants to the Native Courts, which, in the opinion of the Court, are the "Common Law" Courts of Egypt in civil and commercial matters. This view is disputable and inconvenient. The strong position of the Mixed Courts as the foreign and commercial Courts of Egypt makes it all the more desirable that they should extend their jurisdiction to include cases which are clearly within the equity of the statute, if not within the strict letter of the law.

The recent Decree Law of March 27, 1929, mentioned in the preceding note may, however, be interpreted as excluding the possibility of mixed jurisdiction in suits between subjects of non-capitulatory States. Certainly no custom in favour of mixed jurisdiction in suits between persons of the same nationality can be adduced, and on the principles implied in the decision in *Sursock v. Khayyat* quoted above, it seems to follow that mixed jurisdiction will not be asserted in the future.

(b) *Jurisdiction and Law in Matters of Personal Status of Russians.*—Neither the Native nor the Mixed Courts have jurisdiction in matters of personal status of natives or foreigners. Such jurisdiction belongs in the case of Natives to the Moslem Courts, or to the Communal Courts of the non-Moslem Communities, and in the case of foreigners to the Consular Courts. Each applies its own law.

No Consular jurisdiction exists with regard to Russians. What Court is then competent to administer the estate of a deceased Russian? The question has been raised on several occasions before the Mixed Courts, and has received diverse answers.

In the case of *National Bank of Egypt v. Novakoff*³ the Mixed Court of Appeal under the presidency of Mr. Vaux suggested rather than decided that the Courts of the Orthodox Patriarchate would have jurisdiction in case of succession of Orthodox Russians, if, of course, the heirs

¹ *Gazette des Tribunaux Mixtes*, xix, p. 1.

² *Garabedian v. Garabedian*, *Gaz. Trib. Mixtes*, xix, No. 6.

³ *Gaz. Trib. Mixtes*, xvi, No. 191; *Clunet*, 1926, p. 209.

agreed to submit the matter to its jurisdiction. These Courts would apply the Byzantine law.

To this suggestion it may very properly be objected that the local Communal Ecclesiastical Courts have in principle jurisdiction only over natives. However, the suggested jurisdiction was to be based on consent only, and it is possible that on this basis it might be exerciseable.

The judgment in question reversed a decision of the Mixed Civil Court of Cairo holding that the Moslem Religious Courts, being the Common Law Courts of Personal Status in a Moslem country, were alone competent in matters of Personal Status, for all persons within the jurisdiction, save when some Court of exception (Consular or Ecclesiastical) could show a title to exercise jurisdiction. This principle would subject Russians to the Moslem Courts, unless at any rate all the heirs agreed to submit to the Orthodox Court. And the Moslem Courts would certainly apply Moslem Law.¹

The judgment of the Court of Appeal, though reversing this decision on other grounds, did not expressly deny the validity of its conclusions on this point.

Other cases might be cited upon the same question, but it will suffice to refer to two recent decisions. In the first of these, *Garabedian v. Sanglard*,² a Miss Sanglard had obtained a maintenance order from the Moslem Court against Mr. Garabedian, a Russian subject. In accordance with practice, the order was executed by the Execution Officers of the Native Courts. Proceedings were then commenced by Garabedian in the Mixed Courts for the purpose of testing the validity of the Order and the seizure. The validity of both was upheld. As to the jurisdiction to make the Order it was held that in the absence of any Russian Consul having jurisdiction, the Moslem Courts were competent in matters of Personal Status relating to Russians, and this view has been adopted officially by the Government.

Further, assuming the Order to have been made by a competent Court, the execution thereof was held to have been properly undertaken by the Native and not the Mixed Execution Officers, in accordance with the decision in *Garabedian v. Garabedian* above cited.³

The inconvenience of subjecting Christian foreigners to the jurisdiction of the Moslem Courts is obvious, and shortly before the decision in the case of *Garabedian*, a very trenchant judgment had been delivered by the Mixed Court of Appeal, under the presidency of M. Messina, in

¹ As to this see an interesting series of articles in the *Gazette des Tribunaux Mixtes*, xviii, pp. 216 ff., xix, pp. 5 ff., in which it is contended on the one side that in accordance with the Koran (chap. v. verse 51) the Moslem Courts should apply Byzantine law to Christians, and, on the other, that this interpretation of the Koranic text is misconceived.

² *Gaz. Trib. Mixtes*, xix, No. 7.

³ The judgments of Religious Courts are executed in Egypt through the agency of the Execution Officers of the Native or Mixed Courts, as the case may be.

which this point was insisted upon, and a new solution of the problem suggested.

In this second case, *Gregorian v. Gregorian*,¹ rights of inheritance were claimed in the estate of a deceased Russian, and all the parties were of that nationality. This latter fact was, however, immaterial, since the action concerned immoveables, and competence as to suits of this kind even between persons of the same nationality is expressly accorded to the Mixed Courts.

The parties raised an issue as to the law of succession applicable, the defendants pleading that the Moslem Law was the personal law applicable to Russians in Egypt.

The Court rejected this contention in fervent words which expressed a burning zeal for the cause of the National Law : *Si les défendeurs, tout en n'ayant pas renoncé à leur nationalité et à leur religion, croient pouvoir le prétendre pour une simple question d'argent, on ne peut pas admettre en voie de principe que les Russes en Égypte ne soient plus régis dans leurs rapports strictement personnels et familiaux par les préceptes que le génie, les croyances et les besoins de leur race leur ont donnés ; mais soient soumis à des règles qu'une autre race a élaborées, les déduisant de croyances religieuses qui ne sont pas les leurs et les adaptant à des institutions sociales que la loi de l'Islam a profondément empreint dans son esprit.* More convincingly, however, it refers also to Art. 77 of the Mixed Civil Code, which expressly provides that succession is to be regulated by the national law of the deceased.

The crux of the difficulty is not, however, here. The Decree of Organization of Mixed Suits clearly excludes questions of personal status from the competence of the Mixed Courts, and Art. 4 of the Mixed Civil Code directs the Mixed Courts that if any question of personal status arises incidentally in a suit before them they should refer the decision thereof to the competent Court of Personal Status. The question as to who are entitled to share in the succession of the deceased was clearly a question of personal status within the meaning of the Code and the obvious course to adopt would have been to refer the litigants to the Common Law Court of Personal Status for the determination of the question—if such existed. To admit the Moslem Court to be such would, however, infallibly lead to the application of Moslem law, and not the national (Russian) law. The Court consequently rejected the suggestion that the Moslem Courts were the Common Law Courts of Personal Status for foreigners, and proceeded itself to pronounce as to the rights of inheritance possessed by the litigants, not as claiming to be a Court of Personal Status, but on the ground that the question at issue was not one of personal status at all, but one of choice of law. Having exercised its choice in favour of the national Russian law as the law applicable, the Court next held that no need for reference to a Court of Personal Status arose. There was, it said, no dispute possible as to what the

¹ *Gaz. Trib. Mixtes*, xix, No. 8.

rights of the parties would be under the national law of Russia, and that law could therefore be applied without the formality of reference to a Court of Personal Statute.¹ As to which was the national law of Russia, the Tsarist law or the Soviet law, was susceptible, however, of dispute; but since Egypt had never recognized the Soviet Republic it followed that Egyptian Courts could not recognize the pretended abrogation by a purely revolutionary Government of the existing laws of succession. Consequently the Tsarist laws of succession must be held still to be the national laws of Russians so far as the Egyptian Courts were concerned.

F. M. G.

Map of the World's Law.²—Professor Wigmore has prepared a map of the world, showing the legal systems which prevail on the different parts of its surface. It illustrates his recent book, the *Panorama of the World's Legal Systems*. He finds that there are to-day only eight systems of law in operation, and that nine-tenths of the world's population are governed either by one of these systems in a pure form or by a blend or combination of two or more of them.

Where there is no system of law Tribal Custom rules.

The eight systems are, using Professor Wigmore's terminology: Chinese, Hindu, Japanese, Germanic, Slavic, Mohammedan, Romanesque, Anglican.

But only four of these eight are now found as pure systems, viz. Anglican, Hindu, Mohammedan, Romanesque. The others appear only in blends or composites. He distinguishes between blends and composites. In a blend various institutions from two or more systems are fused together into a single system which applies to all persons in the territory. Japan, Siam and Soviet Russia are examples.

A composite is where within the same territory several systems of law exist which are applied to different classes of the population respectively. This is where we have "personal laws," as in India, Egypt and some other oriental countries. The "personal law" may, and generally does, cover certain matters only, while, as to other matters, there is one law for the whole territory.

The whole subject is most suggestive and the map very interesting, though, naturally, in many respects, merely tentative.

South American Journals.—The third volume of the *Anales de la Facultad de Ciencias Juridicas y Sociales* of the University of La Plata (1928) maintains the good lead of its predecessors except that there are

¹ The Court informed itself of the Russian Law by referring direct to articles of the "Civil Laws" of the Russian Empire, and it accepted a "certificate" from the "Head of the Russian Community" at Alexandria stating the relationship of the parties. As to the present value in Egypt of certificates from the former Russian Consular Authorities see *Gaz. Trib. Mixtes*, and note in *Cunet*, 1926, at p. 210.

² *Map of the World's Law*. By John H. Wigmore. (American Geographical Society, New York.)

an undue number of misprints. The Dean of the Faculty, Dr. David Lascano, in the course of the first article draws attention to a remarkable decision by the Supreme Court which after recognizing in 1922 the constitutional validity of the law which corresponds to our "Increase of Rents" Legislation, later declared it unconstitutional in so far as it assumed permanency: that is, it was constitutional only in so far as it applied to the time of post-war crisis. Dr. César Diaz Cisneros writes on the Drago doctrine as applicable to provincial indebtedness. Historians should take note of the descriptive lists of the chroniclers of their writings both official and private which note and describe the events of the Spanish era; added to which is an account of the delimitation of frontiers, particularly those bordering on Brazil at the end of the eighteenth century. This contains sufficient mention of the personnel and of the work done.

We have also received the March-April number of the *Revista de Identificacion y Ciencias Penales*, which also issues from the University of La Plata, and contains (*inter alia*) a very novel article on the legislation affecting an individual's name, founded on that of many countries. There is another on the penal policy of the U.S.A.; and other articles are printed which are worth study.

WYNDHAM A. BEWES.

Malayan Stamp Duties.—A Bill has recently been introduced into the Straits Settlements Legislative Council which has for its object the re-enactment, with amendments, of those portions of the Stamps Ordinance which relate to stamp duties. In very few cases, however, are the stamp duties altered, though in other respects amendments are made to bring the law of the Colony closer to that of England.

NOTICES OF BOOKS

ADMINISTRATIVE LAW IN ENGLAND.¹

In addition to its own merits, the late Mr. F. J. Port's book on Administrative Law has an important introduction by the present Lord Chancellor. In a well-known passage, not quoted nowadays with so much acceptance as formerly, Dicey contrasted the *droit administratif* of France with the rule of law in England and contended that the French system rested upon ideas foreign to the fundamental assumption of the English common law. Referring to this passage Lord Sankey contemplates the possibility that new circumstances may have arisen for which our common law cannot conveniently provide. The increase and complexity of social legislation create situations of an administrative character to which, perhaps, "administrative law" may under proper safeguards be applied. "It is no use," observes Lord Sankey, "trying to defeat it by an appeal to the traditional prejudice against bureaucracy. Some new method must be devised either by adapting new law to modern situations or creating a new code to deal with them. . . . If we have taken steps towards the system of *droit administratif*, it is pertinent to inquire whether we ought not to adopt the real thing with all the special protection it affords upon the subject in France and Germany and not a perversion of it." In somewhat of the same spirit Mr. Port approaches his topic; he sees defects that call for urgent remedy but adds that "these do not in any sense justify the plea so consistently heard from some quarters that the whole modern development of administrative law is wrongly conceived."

After a preliminary chapter defining his subject, Mr. Port sketches the history of the administrative power in England from mediæval to modern times. This sketch, though the substance of it could probably be found elsewhere, is conveniently complete and leads up to an examination of the interrelation of the three governmental functions—legislative, judicial and executive—and a comparative study of the position in America and France. In his first chapter he has already asked whether any precise separation of these three functions is either possible or desirable. The doctrine of the separation of powers he regards as a useful standard for measuring tendencies rather than as a law of the Medes and Persians. As for the intrusion of the executive into the legislative field, he notes

¹ *Administrative Law*, by F. J. Port, LL.D., with a foreword by the Rt. Hon. Lord Justice Sankey. (London: Longmans, Green & Co.) Pp. xxii + 374. Price 21s. net.

the conditions which have caused or accompanied the delegation of law-making power by Parliament. Against certain advantages thus gained, he sets the two not unfamiliar objections that parliamentary scrutiny is often ineffective and that the language of the enabling statute is sometimes so framed as to exclude judicial control. He suggests the intensive and uniform examination of departmental rules and orders by joint or hybrid committees of both Houses of Parliament. Such a plan cannot be appraised until it is elaborated in detail. The power of scrutiny exists already and our Constitution affords opportunities (which other countries envy us) of calling to account the responsible minister if Parliament desires. In non-controversial matters little interest is taken ; in controversial matters there is a natural tendency for the Opposition to attack subordinate legislation on the same lines as those on which it attacked the enabling enactment. Until the power of the brakes and the attitude and power of those who may apply the brakes are known, it is not easy to say how the administrative wagon will run under such a device or whether road accidents are not being averted at the cost of stopping the traffic entirely. As to the intrusion of the executive into the judicial field, Mr. Port makes recommendations not unlike those suggested by Mr. W. A. Robson in his *Justice and Administrative Law*. He advocates first that administrative tribunals should have a uniform system of evidence and procedure ; here every lawyer, of course, would wish to see the accepted practice of the law-courts prevail, but it is idle to ignore the fact that administrative tribunals in some degree serve (like the coroner's court in England) to ventilate local and personal matters which a strict judicial standard might exclude. His other proposals include a right of appeal on all questions of law, the institution of an Administrative Court of Appeal, publicity of hearings and publication of decisions, all formal tribunals to be under the control of the Lord Chancellor and not under the Government department concerned, and an annual report to be made by the Lord Chancellor on the whole system of administrative jurisdiction. These suggestions will not all be equally welcome. The proposal of a new Court of Appeal, half legal, half departmental in its personnel, may startle those who resent the tendency to exclude the jurisdiction of the High Court : it would substitute a big bite for a few nibbles. In this connexion, by the by, it seems misleading to cite the General Medical Council's jurisdiction as a parallel to the modern departmental invasion of the judicial field : the self-discipline of professional, trade and other voluntary associations is an ancient and acceptable feature of English social life. Among other minor points of criticism might be mentioned the tendency to ignore recent statutory changes ; the Insurance Commissioners are spoken of as if the Ministry of Health Act had not been passed ; references at large to the National Insurance Act, 1911, suggest that that statute is still in force ; and words are cited from s. 88 (1) (a) of that Act and from s. 11 (6) of the Unemployment Insurance Act, 1920, as though the passages

were parallel when in fact the one supersedes the other. These minor criticisms, however, are trivial when weighed against the solid merits of a valuable book thoughtfully and sanely written by one whose death is a loss to legal study.

C. T. CARR.

THE BRITISH EMPIRE.

COLLABORATION seldom produces a result so satisfactory as that achieved in *Canada and World Politics*,¹ the outcome of the joint efforts of Professors P. E. Corbett and H. A. Smith. Its essential purpose is to consider the present state of Imperial relations, viewed from the Canadian standpoint. The difficult problems of the relations of the Empire to the League of Nations, of the interpretation and effect of the resolutions of the Imperial Conference of 1926, and of the probable development in the immediate future of Imperial relations, are discussed with refreshing clearness and brevity. The outlook of the authors conveys the impression of being in entire harmony with the essential Canadian political tradition in matters of Imperial interest, as displayed in the views of Sir John Macdonald and of Sir Wilfrid Laurier, and as followed by Mr. Mackenzie King prior to 1926. The more aggressive aspect of the latter's policy, which is doubtless due in part to the influence of Mr. Lapointe, is viewed with some reserve by the authors; but they explain admirably (pp. 125 ff.) the significance and possible value of the election of Canada to membership of the Council of the League of Nations. A refreshing sense of reality is revealed throughout; special value attaches to the candid exposition (pp. 237 ff.) of the military dependence of Canada on the United States; as Mr. Hughes has recently insisted, the international importance of Canada lies precisely in the fact that she is part of the British Empire, and her intervention at Geneva possesses a weight which otherwise would be denied to a Power which maintains neither an army nor a navy. The autonomy of the parts of the Empire, including the United Kingdom, must, the authors in effect contend, be so developed and expressed as never to transgress the fundamental unity, which lends the Empire its unique importance and authority, even in the face of so great a Power as the United States.

On minor points it is possible to differ from the authors. It is clear that the fundamental distinction between colonies by conquest or cession, and by occupation, *i.e.* settlement, has been overlooked (p. 25); the Crown cannot by Order in Council legislate for a settled colony. Nor can it legislate for a colony of any other kind to which it has given a representative constitution, unless the power has been reserved in the instrument conceding that form of constitution.² The Order in Council overriding Newfoundland legislation of 1907 was not, and could not be,

¹ *Canada and World Politics*. (London: Faber & Gwyer, 1928.) Pp. xvi + 244. Price 10s. 6d.

² *Campbell v. Hall*, 20 St. Tr. 239.

a prerogative order ; it was deliberately and formally issued under the Imperial Act of 1819, passed in order to enable the Crown to carry out the fishery treaty of 1818 with the United States of America.¹ Nor can it be agreed that the Irish Free State is " exempt from the operation of the Colonial Laws Validity Act, since she is expressly empowered to adopt or reject imperial legislation at her own discretion." The authority cited is s. 3 of the Irish Free State Constitution Act, 1922, but the terms of that obscure and badly worded section have, in all probability, a much more restricted meaning. Their reference is clearly to Acts passed before the Act of 1922, in which special provision was made as regards the Dominions ; the Free State Parliament is given the right to add the Free State to the list of Dominions set out in such Acts as the Copyright Act, 1911, and the British Nationality and Status of Aliens Acts. By a clause of this kind to repeal as regards the Free State the application of the Colonial Laws Validity Act, 1865, would be a very amazing procedure, and the Privy Council would probably decline to place so broad an interpretation on the section in question. It appears clear that there is a misunderstanding (p. 21) as to the action of Lord Byng in refusing a dissolution to Mr. Mackenzie King, for it is held that the standard adopted was that of the King in the United Kingdom. But, if Lord Byng had adopted this criterium—and the evidence appears conclusive that he did not—he certainly would never have declined to grant a dissolution to his Prime Minister in the circumstances in question. The obvious fact is that Lord Byng relied on colonial precedent, which unquestionably permitted his action, but in doing so he ignored the contention that Canada had acquired such a status that colonial precedent was outworn, and unluckily he had no constitutional experience of his own to guide his action. The episode is of historic importance largely because, as Mr. Hughes² justly insists, it had a decisive effect on the attitude of the Prime Minister of the Dominion at the Imperial Conference of 1926, and secured his support for the claims of the Irish Free State and the Union of South Africa.

While Professors Corbett and Smith are content to adhere strictly to practical considerations, Professor P. J. Noel Baker³ is chiefly concerned to establish the theory that the British Dominions have international personality, a doctrine which I have always upheld as regards their position in the League of Nations, but which seems to me inapplicable if stated absolutely.⁴ Fortunately the author's conclusions are rendered much more acceptable by his denial (p. 369) that the relation between Great Britain and the Dominions is merely a personal union, and by his admission (p. 368) that " the British Empire is still not only a political

¹ Keith, *Imperial Unity and the Dominions*, pp. 283 f.

² *The Splendid Adventure*, pp. 157 f.

³ *The Present Juridical Status of the British Dominions in International Law* (London : Longmans, 1929.) Pp. xii + 421. Price 21s.

⁴ See Wheaton, *International Law* (ed. Keith, 1929), i. 30 ff. Cf. also Mr. Henderson's statement at Geneva, September 19, 1929, which supports this doctrine.

unit in the world of States, but also for certain purposes also (*sic*) a single unified person of International Law." The author's conclusions, therefore, hardly carry us beyond the recognized fact that the British Empire in its international aspect is *sui generis*, and will not fall into any orthodox classification, and one may doubt whether it is not really better to adhere to this fact rather than seek to fit the Empire and its parts under conventional heads devised under other conditions. Professor Baker's desire, as was natural in one lecturing at The Hague, was to stress the independence of the Dominions. Yet he rejects General Hertzog's doctrine that the Dominions can be neutral in a British war (p. 335), though holding that the Union could secede by a simple Act, without ratification by the Imperial Parliament (pp. 258 ff.). The author is a strong supporter of the view that the Secretary of State for Foreign Affairs has only formal functions in obtaining the royal signature to full powers and ratifications of Dominion treaties (pp. 191 ff.); no Secretary of State has yet asserted this view, and the House of Commons would hardly accept it as an excuse if it found that the Irish Free State had concluded a treaty conceding to France a preference over British exports. No argument can be drawn as to the treaty power in general from Labour Organization conventions,¹ for it is not doubted that within the League of Nations the Dominions have international status; Canada and the other Dominions appear clearly to distinguish between these conventions and treaties in the narrower sense. Under the procedure laid down by the Imperial Conference of 1926 it appears that League agreements will normally assume full treaty form with signature and ratification under royal authority. Nor is the retention of control remarkable, when, as the author admits (p. 236), the Imperial Government did not surrender even in 1926 its right to advise the Crown regarding reserved bills of Dominion legislatures, which were certainly not likely to be of greater Imperial concern than treaties. There seems some contradiction between the admission of p. 236 and the argument at p. 200, where it seems to be held that a British Minister submits Dominion Acts to the King for the royal assent, but has no right to advise that the Acts be not approved. The facts are that under the Conference resolutions Acts are not submitted to the King for approval by a British Minister at all, and that in submitting reserved Bills he accepts responsibility for his advice, as Sir Francis Bell² has convincingly pointed out. Nor, of course, is it the case (p. 130) that the Conference report has been approved by the Parliaments of all the Dominions; only the Union Parliament has so acted.³

A most interesting discussion of the now pressing question of the

¹ Cf. *Journal of Comparative Legislation*, Third Series, vol. xi, pt. i, p. 123.

² *New Zealand Parliamentary Debates*, ccxviii. 77.

³ The assignment of the second edition of my *Responsible Government* to 1928 in lieu of 1927 explains some invalid arguments based on the date (e.g. p. 152); Lord Durham's mission to Canada is also placed a year too late (p. 35), and the fourth edition of Oppenheim's *International Law* has been promoted to the fifth (pp. 353, 418).

amendment of the constitution of the Commonwealth of Australia is contained in the Hon. W. A. Holman's lectures before the University of Queensland.¹ As a leading figure in the political life of the State of New South Wales, it is natural that Mr. Holman should present the arguments for the maintenance of the federal system with special force, and the value of his presentation is greatly increased by the clearness and objectivity of the exposition of the course of judicial interpretation of the constitution on which his discussion of changes is based. The case against any proposal of unification is strongly, but quite fairly put, nor, it is clear, would anything be gained from an attempt to remould the federal system on the Canadian model. The existing confusion is, not unreasonably, traced to the confused policy which denied to the Commonwealth any legislative control over the prevention and settlement of industrial disputes extending beyond the limits of a State, but permitted the creation of the Commonwealth Court of Conciliation and Arbitration whose authority outweighs the legislation of the States. Mr. Holman advocates the definition of powers over industrial matters so that, for instance, the Commonwealth should control the regulation of seamen's conditions and the States those of farm labourers. He suggests also the definite restriction of Commonwealth authority by forbidding encroachment on State subjects indirectly by the exercise of the taxing power or the power incidentally to deal with matters not immediately within Commonwealth authority, and an adjustment of State sources of revenue, so as to assure the States adequate means for carrying out their important functions. There must be considerable sympathy with the suggestion that alterations of the constitution affecting the distribution of powers between Commonwealth and States should be submitted to the State Parliaments as well as to the Commonwealth Parliament before the people decides by referendum. The present system has merely resulted in defeating every attempt at vital change. It is interesting to note that Mr. Holman advocates a wider right of appeal to the Privy Council in constitutional issues where the High Court is sharply divided or where a doctrine frequently enunciated is abandoned or reversed. Opinion in the Commonwealth is, he thinks, marked by a confidence in the Privy Council which unhappily did not exist during the period when the constitution was framed.

A. BERRIEDALE KEITH.

ENGLISH CONSTITUTIONAL HISTORY.²

THIS is a much-improved edition of a book which has throughout its half-century of service to students kept a leading place among manuals

¹ *The Australian Constitution; Its Interpretation and Amendment*. John Murtagh Macrossan Lecture, 1928. University of Queensland. Pp. 83.

² *English Constitutional History, from the Teutonic Conquest to the Present Time*. By T. P. Taswell-Langmead. 9th ed., edited by A. L. Poole, 1929. (London: Sweet & Maxwell.) Pp. xxvi + 784. Price 12s. net.

of constitutional history. Mr. Poole has carefully revised both text and notes, and has remodelled and extended the final chapter in order to deal with the main developments of the ten years which have elapsed since a new edition was last called for. Such important measures as the Enabling Act, 1919, the Representation of the People Act, 1928, and the Local Government Act, 1929, are described, the progress of colonial self-government is traced in a section for which the editor has enlisted the assistance of the Beit Lecturer, Dr. Morrell, and space is found even for the Montagu-Chelmsford reforms in India and for a reference to the Simon Commission. Mr. Poole's most valuable work has been done on the earlier chapters of the book, where the text, and to some extent the notes also, no longer adequately represented the results of modern historical inquiry. Here he has made many important changes. Corrections formerly relegated to footnotes have been incorporated in the text, the text itself has been lightened of much which has failed to survive recent criticism, and new material has been added. A comparison of the present edition with its predecessors on such main questions as the Anglo-Saxon land system, the rise of the borough, the legal and constitutional significance of Magna Carta, the development of representation, and the origin of Star Chamber repeatedly illustrates the care with which the work of Maitland, Vinogradoff, McKechnie, and later writers such as Professor Baldwin and M. Pasquet has been utilized, though the present reviewer is unable to find any mention of Professor Pollard's article on Star Chamber in *English Historical Review*, 1922, which might also perhaps have been mentioned. A four-page bibliography of the more important works referred to in the notes is a new and useful feature of the book. With all these changes, the size of the volume has been slightly reduced, and it is compact and manageable. It has been much improved typographically by the deletion of the brackets which marked the interpolations of former editors.

Mr. Poole has indeed done so much that one is tempted, at the risk of appearing insufficiently appreciative of his work, to wish he had done even more. For example, a stricter revision of the account of Frankpledge would certainly have eliminated at least one obvious mis-statement. Nor is it satisfactory that the book, although largely intended for law students, still contains no adequate account of the possessory remedies. Both the objects and the limitations of that much misunderstood statute, 31 Hen. VIII, c. 8, might have been made clearer. It is misleading to find the historical fictions of the County Courts Act reprinted without comment as they are in the note on p. 131. Again, the modern practice of keeping minutes of Cabinet meetings invalidates one of the remarks made on p. 641 regarding the secrecy in which that body works. A number of misprints, none of them, however, very serious, have passed unnoticed, and the titles of works by M. Flach and Professor Pollard are not quite correctly quoted in the notes.

Yet these are in the main criticisms of detail. Mr. Poole has ensured

to Taswell-Langmead's book an enhanced reputation and a new period of usefulness, and it is to be recommended as a sound and unusually comprehensive guide to its subject. While losing none of the features which have commended it to the student of law, it comes again to deserve the regard it once enjoyed among professed historians.

D. LINDSAY KEIR.

CARRIAGE OF GOODS IN ROMAN-DUTCH LAW.

THIS book¹ is described as a "thesis approved for the Degree of Doctor of Laws in the University of London (1925)." The Rt. Hon. Sir James Rose Innes, late Chief Justice of the Union of South Africa, contributes a short introduction. In his first chapter on "The Origin of the Liability," Mr. Donges unfolds his theory of the source of the carriers' liability for the safe carriage of goods in Roman-Dutch law. He finds its origin in the Sea Law of the Rhodians. "Its development has taken a twofold course—the one a progressive and living, the other a more indirect and at times stagnant stream." The first is the customary sea law, which ultimately found its way into the so-called Laws of Wisby, which in turn inspired the Maritime Law of Charles V (1551) and of Philip II (1563). It is from these laws, though Mr. Donges does not mention the fact, that Grotius drew for his exposition of the sea laws of Holland in the third book of his *Inleiding*. The other source of the Roman-Dutch law relating to the carriers' liability is the Roman law, and particularly (as in Scotland) the Prætor's Edict *de nautis, stabulariis et cauponibus*.

Mr. Donges develops his historical argument in an interesting and suggestive way, but he does not make it plain that the Sea Law covers the ground occupied by the Prætor's Edict. He says (p. 19) that the provisions of the Dutch Placaats do not differ on this point from the law of the *Digest*. But the passage cited on p. 17 from the Placaat of Philip II does not support this statement. By the Prætor's Edict proof of negligence is not necessary to establish the carrier's liability. Was it necessary by the Sea Law? However this may be, Mr. Donges is right in saying that the Roman-Dutch authors treat the Prætor's Edict as the source of the law relating to this subject.

Building upon this basis he devotes the rest of his book to the exposition of the Edict and its application in the South African Courts. But, if the modern law depends wholly on the Edict, the opening chapter, however interesting in itself, seems scarcely relevant to the argument. It may be added that a resort to the Sea Law of Holland determined the decision of the Cape Court in *Smith v. Davis* [1878] Buch. 66, and may still be necessary in Natal, when the Court is exercising its ordinary civil jurisdiction and not sitting as a Colonial Court of Admiralty. Such a contingency has been excluded at the Cape since the passing of the General Law Amendment Act, 1879.

¹ *The Liability for Safe Carriage of Goods in Roman-Dutch Law*. By T. E. Donges. (Cape Town: Juta & Co., 1928.) Pp. xv + 134. 15s. net.

Mr. Donges has produced a work which gives evidence of painstaking research in the old authorities, and of a careful investigation of the existing law of South Africa.

R. W. LEE.

INTERNATIONAL LAW AND THE LEAGUE OF NATIONS.

THIS book¹ does not profess to be a complete treatise on international law, but a series of chapters dealing with certain aspects of international relations from a legal standpoint. Many of the chapters are based on lectures and articles written for various bodies and periodicals between 1923 and 1928.

The book is essentially modern in its outlook. The field of international law has been subjected to far-reaching changes through the Great War and the developments that have followed it, and the author's views and arguments take full account of these changes. He draws his illustrations largely from recent events, cases and documents, and boldly grapples with the many difficult problems raised for the international lawyer by the new world conditions.

The author has been, since the war, British legal representative on the Reparation Commission. Not unnaturally, therefore, the book deals at considerable length with international relations as affected by reparations, debts and other financial matters. Various other subjects also are taken up which have acquired special importance since the war, such as demilitarized zones, denationalization, expropriation of the property of aliens, treatment of private property in war, jurisdiction in cases of negligence and other offences at sea, abrogation of treaties by change of circumstances and questions concerning the development of an international criminal law. There are chapters also discussing the legal status of the League of Nations, questions of sovereignty and possession of territory as affected by the establishment of the League, and the limits within which unanimity is requisite or majority decisions are permissible under the League.

The first three chapters are more general in character, and deal with the nature and binding force of international law, its place in international relations, and the new methods and processes which its development requires.

In the course of these early chapters the author contends that the alternative to war is to be found in law, if law be looked upon, for this purpose, as including legal rules, recognized as binding, and also effective arrangements for making peaceable changes in those laws. He rebuts the idea that there are areas in the field of international relations which international law does not cover, and contends that the Permanent Court

¹ *Chapters on Current International Law and the League of Nations*, by Sir John Fischer Williams, C.B.E., K.C. (London: Longmans, Green & Co., 1929.) Pp. viii, + 513. Price 25s. net.

of International Justice has ample authority to reach legal solutions in all cases coming within its jurisdiction. But he recognizes that on legal points not covered by authority the law which the Court will declare is *in gremio judicis*, and that one or more powerful nations may be disinclined to obey the law as and when it is declared. He admits that something analogous to legislation is required where States want the law altered, and that perpetual peace is impossible until a method is devised for the peaceful redress of international grievances which are the result of the existing legal situation. This, he says, is the crux of the international problem.

He points to Article 19 of the Covenant of the League as being important from the international lawyer's point of view in that it indicates a growing consciousness of the need for having in reserve a power which, even if for the present it acts by persuasion, is in essence a legislative power, to modify not merely existing international contractual obligations, but international conditions generally, in the interests not merely of the parties to a treaty, but of the whole international community. He suggests that provision might be made for legislative changes of legal rights by means of the decisions of international conciliation commissions, confirmed by majority resolutions of the Council and Assembly of the League. Such decisions, he thinks, would not be disregarded in practice by Sovereign States, any more than our constitutional sovereign disregards the advice of the Judicial Committee of the Privy Council.

Another concrete suggestion he makes is that the development and strengthening of international law might be encouraged by the establishment of a permanent international teaching institution of university rank for advanced students who have already studied the subject in their own national schools of law. Such an institution might, he thinks, be developed out of the existing Academy of International Law at The Hague.

He seems disposed to throw cold water upon the idea of the making of early efforts to codify international law, and states that "international law must not present itself as something which learned men elaborate and impose, but as something which, in the main, judges in whom the nations have confidence accept from the general sense of mankind and declare, step by step, as particular problems arise." But, surely, the judges themselves come essentially into the category of "learned men," and the "general sense of mankind" is more likely to be found in a code propounded through the combined effort of the representatives of all the nations forming the Assembly of the League than in the opinions of legal experts sitting on a judicial bench.

At p. 38 the reader will find a discussion of the meaning of the Optional Clause of the Statute of the Permanent Court, and some doubts expressed as to its precise effect.

An Appendix sets out a Table of Cases cited, and there is a good Index.

F. N. KEEN.

THE LAW AND PRACTICE OF INDUSTRIAL CONTROL ¹

THESE two volumes approach from the opposite sides of law and practice, one of the most urgent problems of the present day. Regardless of the opinions of both individualists and socialists, the manufacturers and traders are organizing themselves in rings and kartells and trusts ; in bigger and bigger companies which tend to absorb more and more of their rivals ; until it would seem inevitable that each branch of commerce and industry must become a monopoly, with a stranglehold over the general public outside. The paradoxical result therefore seems likely to follow, that the Individualist system (if left to itself) will do just what the Socialists profess to want in theory—i.e. a united organization—but with effects of practice which will be resented by Individualists and Socialists alike.

This condition of affairs, in law and practice, is very ably discussed by these two authors. *The Problem of Trust and Monopoly Control* by Mr. A. P. L. Gordon is a very closely argued statement of the Kartell system, mainly in Germany, but also as it affects England. It is an interesting example of how useful the scholarly mind of an Oxford man can be in the practical organization of industrial affairs. Whether one agrees or not with his conclusions, his book should be most carefully read by both theoretical politicians and practical men of business. One sentence on his last page will show the trend of his thoughts : “ It cannot be too strongly emphasized that the danger lies not in monopoly itself, but in the abuse of monopolistic power ; a system of prohibition, therefore, fails to tackle the real problem . . . restrictive legislation must be blamed if, particularly in this country, the strength of monopolists has often been forced into sterile and obnoxious channels.” The comparison of the German system with the English is very valuable.

Mr. W. A. Sanderson's *Restraint of Trade in English Law*, in form a text-book for the professional lawyer, is a most useful volume which covers a wider field than its title claims. For it gives a very scholarly account of the history of a department of law of which the roots go very deep in all social life, and it also treats not only of the special laws of the Colonial States, but also gives a brief, but effective, account of the history and present practice in the chief foreign countries. The volume is a fine combination of the mind of the philosopher applied to the work of the practitioner ; and, coming from an Australian source, is a suggestive sequence to the works of Sir John Salmond and President Jethro Brown. This work will be not only useful to the practising lawyer and the legislator, but also to the historian ; and the general reader will find it an exceedingly interesting account of a subject which concerns him more and more every day.

G. R. S. T.

¹ *The Restraint of Trade and English Law*. By W. A. Sanderson. (London : Sweet & Maxwell Ltd.). Pp. xxiv + 208. Price 15s. net.

The Problem of Trust and Monopoly Control. By A. P. L. Gordon. (London : Routledge). Pp. viii + 186. Price 5s. net.

INTERNATIONAL LAW.

SUCCESSIVE parts of Professor Anzilotti's treatise on International Law have been appearing piecemeal in the last fifteen years in the Italian language. But no comprehensive treatise has been published so far, and the work has been available only in its original language. The present edition,¹ admirably translated into French by Professor Gidel, makes the treatise available for a much larger circle of readers than hitherto. Although the volume is still confined to one part, mainly introductory, of the international law of peace, the student will read this treatise with interest and advantage. It may be confidently said that this is the most thorough, scientific and modern work on international law which has appeared since the war on the Continent. In this Part, Professor Anzilotti is concerned not so much with the details of the problems which he discusses as with general principles. They are treated with great learning and with obvious indebtedness to the German and Austrian literature on international law, an indebtedness which Professor Anzilotti is the first to acknowledge. There is in this work a spirit of philosophical detachment and impartiality which makes it international in the best meaning of the word. In addition, the views with which Professor Anzilotti disagrees are treated fully, critically, and with sympathetic understanding. The passages on natural law—Professor Anzilotti is an adherent of the positivist school—are a welcome example of this method of treatment.

The present volume is composed of an Introduction and of the first Part of the treatise, entitled "General Theories." In the Introduction the author discusses the conception of international law, the relation of international law to municipal law, the sources of international law, the limits of the efficacy of the rules of international law, and the co-ordination, interpretation and application of rules of international law. The first chapter of the "General Theories" discusses the subjects of international law, namely, the legal personality of international law, its beginning and its termination as well as the different qualifications of international personality embodied in composite, dependent and neutralized States. The second chapter discusses the organs, individual and collective, through which States act in the international sphere. International administrative unions are treated in this part in great detail. The third chapter, entitled "Juridical Facts," discusses the various manifestations of the will of States. Here belong the sections on notification, protest and renunciation as examples of unilateral acts, and a detailed discussion of treaties as typical of bilateral acts. Finally, in a long chapter on illicit international acts, Professor Anzilotti restates his theory of absolute responsibility.

The treatise bears constant evidence of the willingness of the dis-

¹ *Cours de Droit International*, by Dionisio Anzilotti, 1929, pp. 536. French translation, by Gilbert Gidel. Recueil Sirey, Paris.

tinguished lawyer to revise his former views whenever necessary and to adapt them to the new developments. The place which he now allots to the rule *pacta sunt servanda* as the fundamental principle independent of the will of States shows that his positivism is neither dogmatic nor incapable of substantial modifications. In his doctrine of Recognition he makes excellent use of the rule *pacta sunt servanda* thus conceived. A further example showing that the author does not hesitate to weigh his views in the balance of experience may be seen in his treatment of Article 38 of the Statute of the Permanent Court of International Justice. In the Italian edition of 1922-3 Professor Anzilotti referred to this provision as "*quest' infelicissimo articolo*," but the present edition shows a full appreciation of the possibilities of this Article. Nevertheless, certain passages still create the impression that artificial constructions are used without sufficient explanation in order to support certain theories. Thus, we submit respectfully, we remain unconvinced by the statement that the Mixed Arbitral Tribunals are not international tribunals, but joint courts of the contracting parties. Surely, the fact that corresponding laws relating to these tribunals have been enacted in various countries does not make of them joint municipal courts. Neither does the cautious treatment of the position of British self-governing Dominions in international law reveal an inclination to acknowledge the full legal significance of the new developments. The Imperial Conference of 1926 is not discussed at all, and in regard to the actual position of diplomatic representation of the Dominions the treatise does not appear to be up to date.

It is fitting that a treatise written by a member of the Permanent Court of International Justice, who is now its President, should contain copious references to the judgments and advisory opinions of the Court. The present volume contains in fact an authoritative, although unofficial, interpretation of many pronouncements of the Court. The student will be specially grateful to Professor Anzilotti for this aspect of his work.

We understand that a German translation of the present volume is now in the press. Is it too much to hope that a suitable translation will make this treatise available also to the English reader? The study of this work is bound to stimulate a more philosophic approach to the study of international law in this country, and also to make English-speaking students better acquainted with the recent tendencies in the theory of international law on the Continent. Such an English edition would probably have the merit of being produced on a paper and in a binding worthy of the substance of the work.

H. L.

CASES IN CONSTITUTIONAL LAW.¹

THIS case-book of constitutional law marks a great advance on any previous collection. It will be of much service to teachers of this

¹ *Cases in Constitutional Law*, by D. L. Keir, M.A., and F. H. Lawson, M.A. (Oxford: Clarendon Press.) Pp. 479. Price 25s. net.

subject, and to students of the British Constitution, whether lawyers or not.

The cases are arranged clearly under headings such as Legislation, Prerogatives, Remedies against the Crown, the Overseas Dominions—to take a few examples—and each group is preceded by an Introduction containing a short discussion of the law on this branch of the subject.

A considerable proportion of the cases select themselves. A collection of cases on British constitutional law can hardly omit *R. v. Hampden*, *Stockdale v. Hansard*, *Phillips v. Eyre* and so forth. But there is quite a bright band of recent cases which one is delighted to find here.

The whole book illustrates what people are inclined to forget, that the Constitution is not static, and that the main interest has shifted to topics such as Judicial Control of Public Authorities, Remedies against the Crown and the Legal Status of the Dominions. In this connexion we should have liked to see *Jerusalem-Jaffa District Governor v. Suleiman Murra* [1926] A.C. 321, as elucidating the status of a mandated territory.

The signal merits of this collection are that its editors look at the whole field from a modern point of view and that, with few exceptions, they give the judgments in full, or at least the most instructive judgment in each case.

The last editor of a previous collection says in his preface: "I am quite aware that a more scientific arrangement is possible, but, after all, the cases are there and can easily be found." Whereas the trouble is precisely that the cases are *not* there, but only snippets of them.

The editors of this book are on firm ground in insisting on the value of the *ipsissima verba*.

To learn as a fact what was decided in *Brown v. Jones* may adorn the memory, but it will not train the reasoning power. It is a legal education to trace the steps by which a great judge reaches his conclusion. The student who reads carefully the opinion of the judges in *Mersey Dock v. Gibbs*, the judgment of the Exchequer Chamber in *Phillips v. Eyre*, or Lord Moulton's judgment in *Att.-Gen. v. De Keyser* has learnt much more than a mere legal proposition.

The only criticism we feel inclined to make is to doubt whether the editors are wise in altogether excluding head-notes. In some of the cases the young reader is plunged rather suddenly into deep waters. If head-notes are contrary to the doctrines of case-bookery, then why not give a fuller statement of facts? Occasionally the brevity of the statement leads to a little obscurity. The student who reads in *Royal Aquarium v. Parkinson*, on p. 211, as to evidence of express malice, "The figures referred to were produced before the jury," is left to wonder what kind of figures they could be which were evidence of express malice—arithmetical, geometrical or what else? It would be a grave mistake to think

that this book is of interest only to teachers and examinees. It ought to be read by many people whose examination days are over.

F. P. W.

LIBEL AND SLANDER.¹

WITHOUT attempting to institute invidious comparisons, it may be said with confidence that this book has won for itself a secure position. The fact that a book on this monumental scale should have gone to a second edition in four or five years is a sufficient indication. And who would like to set his opinion against that of McCardie J., who says in his Foreword, "I feel no doubt that Mr. Gatley's treatise on Libel and Slander will take its place as the classical work on the subject"?

It is in truth a fine performance, full, clearly written, well arranged and easy to find one's way about, and its value is enhanced by the collation of Scottish, Irish, Canadian (omitting Quebec), Australian, South African and American cases.

A continental lawyer would rub his eyes when he read that this great tome aims at setting forth "in a concise form the leading principles of the law of libel and slander in a civil action."

It is significant of the difference between the civil law and the common law that in France there is no modern book at all on this subject, and, in fact, no technical term for this kind of wrong. *Diffamation* is a penal delict, civil libel is merely one of the myriad forms of *faute dommageable*. A comparison between the two laws would be interesting and profitable, but this is not the place to attempt it.

"Fair comment" is pretty well equated by *s'il ne dépasse point les bornes d'une critique honnête et utile*.

And the defence that the words were spoken in *l'accomplissement d'un devoir ou l'exercice d'un droit* corresponds pretty well to the plea of privilege. In some matters the civil law has been better guided than ours. Truth is not an absolute defence, and it would not be so in England, if the recommendation of the Select Committee of the House of Lords, appointed in 1843 to consider the law of the subject, had been adopted.

There are cases in which, *e.g.*, the raking up of some old misconduct where no public interest is served thereby ought not to be a ground of damages. And we think the French law does well to give a remedy in some circumstances for a libel on the dead.²

But, though a civilian would marvel at the length of our English textbooks, the English lawyer will not want Mr. Gatley's book to be any shorter. He knows that he is morally sure to find in it all that he expects.

F. P. W.

¹ *Law and Practice of Libel and Slander in a Civil Action*, by Clement Gatley, D.C.L., LL.D., 2nd ed. (London: Sweet and Maxwell.) Pp. cxlii + 1039. Price 52s. 6d. net.

² See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. i, p. 1.

DE L'ESPRIT DES LOIS ET DE LEUR RELATIVITÉ—LES MOBILES DANS LES ACTES JURIDIQUES DU DROIT PRIVÉ.¹

THESE two books by the Dean of the Law Faculty of Lyons are complementary to one another. The former treats of the various cases which the French law denotes as *l'abus des droits*, and extremely interesting they are to study. An act which, in normal circumstances, would be the exercise of a legal right becomes unlawful when it is done abusively without a lawful motive, and it causes damage to another.

According to the view which M. Josserand adopts *l'acte abusif est l'acte contraire au but de l'institution, à son esprit et à sa finalité* (p. 370). This is the doctrine laid down in the Soviet Civil Code of 1923. *Les droits civils sont protégés par la loi, sauf dans les cas où ils sont exercés dans un sens contraire à leur destination économique et sociale.*

The cardinal principle of the relativity of rights is laid down also in the German Civil Code (see specially Art. 226), in the Swiss Civil Code (Art. 2), and in the new Art. 1295 of the Austrian Civil Code.

In England an owner can put up a spite-fence at pleasure, or he can sink a well for the purpose of drawing away the water from his neighbour, though he does not need it himself. This is not so in France or in the other countries which have recognized the theory of *l'abus des droits*. In France the limitation of the right of ownership is traditional. Voltaire taught good law when he said : *Un droit porté trop loin devient une injustice.*

But in modern times the theory of *l'abus des droits* has been much developed by the French courts, and the principle has been applied in various classes of cases besides those of ownership of immovables.

This book gives by far the best and clearest account which we have seen of the whole subject.

Les Mobiles deals with the legal effect of purpose upon the validity of juridical acts. We are tempted in English to use the word "motive," but that term does not correspond fully to *mobiles*. In the sense in which M. Josserand employs the word *les mobiles* mean what the glossators call *causa finalis*. If a man buys a motor-car we might say that his *motive* in doing so was that his old car was worn out. But the purpose or *mobile* is something which looks to the future. He buys the car to use it in his business, or to give it to his son, and so forth. The *mobile* is always extrinsic to the act, and it varies in every case. Starting from this proposition the author discusses the effect of the purpose of a party in various classes of legal acts. The vices of consent in contract—error, fault, violence—are cases in which the purpose of one party has been, so to speak, infected.

Contracts which are unlawful are illustrations of *mobiles vicioux*. The distinction between onerous and gratuitous acts, so important in

¹ By Louis Josserand. Paris : Dalloz. Pp. 426, and pp. 426. Price 40 francs each.

the French law and sometimes so difficult to draw, turns ultimately on the real motive of the parties.

It is not possible in a short review to give any idea of the absorbing interest of the book. It is packed with apt citations from modern cases, and we find ourselves regarding from a new angle a large part of the legal field. It is instructive to observe how completely the traditional theory of cause has fallen into the background. The anti-causalists may not have succeeded in getting the term eliminated, but they have certainly driven their opponents into giving to *cause* a meaning which would have greatly surprised the French codifiers or the old commentators. But this is a long story.

F. P. W.

ENGLISH LABOUR LAW.¹

THESE two books illustrate in a striking manner the interest taken in English law on the Continent at the present time.

Dr. Hamburger tells us that he came to England with a travelling scholarship shortly after the end of the General Strike and that he was in this country during a considerable part of the discussion of the Trade Disputes Act, 1927. This drew his attention especially to the law relating to strikes.

His excellent study is, in effect, a commentary on the Act of 1927, of which he gives a German translation in the Appendix, and it contains a good deal of pretty sharp criticism. It is written for German readers and probably, on that account, does not give much information as to the German experience of courts of arbitration or other methods of avoiding strikes.

The work of M. Paul Baratier has a wider range. It treats of the whole question of the judicial control of trade unions in England, reviewing the decisions very fully and clearly, and comparing the results with those reached in the United States and in France.

M. Baratier's book is another product of the Institut de Droit Comparé de Lyon, and we may note that this admirable institution has now to its credit five studies of different branches of English law concerning labour questions. These are: Fouilland, J., *Allen v. Flood. Le boycottage, les listes noires et les autres instruments de contrainte syndicale devant la loi civile*; Hoffherr, R., *Le boycottage devant les cours anglaises*; El Arabi, *La conscription des Neutres dans les luttes de la concurrence économique*; Al Sanhoury, *Les restrictions contractuelles à la liberté individuelle de travail dans la jurisprudence anglaise*.

The series is concluded very successfully by the work of M. Paul Baratier.

F. P. W.

¹ *Streik, Aussperrung und Berufsverbände im Neuen Englischen Arbeitsrecht*, by Dr. Ludwig Hamburger. (Berlin: Bensheimer.) Pp. 80.

L'Autonomie Syndicale et ses Limites devant les Cours Anglaises, by Paul Baratier. (Paris: Giard.) Pp. 315, price 40 francs.

PUBLIC INTERNATIONAL LAW CASES.¹

THE editors of this handsome book are to be warmly congratulated. The *Digest* includes some 200 decisions by national courts in the various countries and 150 or so by international courts, including the Permanent Court of International Justice, the Mixed Arbitral Tribunals, the Ottoman Debt Tribunal and many others.

The preparation of the work must have involved an enormous amount of labour, and it has manifestly been carried out with great care and judgment. No small part of the difficulty consists in getting into touch with suitable and willing contributors in so many countries. We suppose fifty at least are here represented. Now that this has been done it should be less difficult to continue the series. Even when, as in Spain, the covers have been drawn blank, skilled labour has been expended.

Probably the most valuable part of the collection consists of the decisions by the less important tribunals. Judgments of the House of Lords or of the Permanent Court of International Justice are not likely to be overlooked, whereas many of the decisions in the *Digest* are almost inaccessible to the ordinary student and might easily be lost sight of even by those who have a large library at their back. It hardly seems consistent with the modernizing spirit of Turkey that in that country there should be "some official objection to the publication of judgments to others than the parties concerned in the litigation."

The *Digest* is presented in a most business-like form, with a full classification or analysis, and a good index. It will be indispensable to the international lawyer.

SURVEY OF ENGLISH LAW FOR 1928.²

THIS is a publication of a quite novel character, and it will be extremely useful. It is the joint work of the members of the Department of Law and of the Department of International Studies at the London School of Economics.

The idea is to give a short account of the legislation and case law of the year classified under the different branches of law with a bibliography of works and articles which have appeared during the year. It is a thoroughly sound scheme and very well carried out.

No doubt some readers will miss cases which might have been included, but probably those selected include all the decisions which are of much general interest. The pith of the decisions is given, sometimes with valuable comments and references, to articles in which the case is dis-

¹ *Annual Digest of Public International Law Cases*, Years 1925-6, edited by Arnold D. McNair, C.B.E., LL.D., and H. Lauterpacht, LL.D., Dr. Jur. (London: Longmans, Green & Co.) Pp. xiv + 497. Price 35s. net.

² *Annual Survey of English Law*, 1928, London School of Economics. Pp. xv + 301.

cussed. Particularly useful are the bibliographies which contain references to many articles in legal periodicals which are so easily overlooked. We shall be surprised if the book is not found serviceable by practitioners as well as by teachers and students, and we hope that this may be the first of many *Annual Surveys*.

THEORY OF THE SOVIET STATE.¹

THIS is a valuable book for the lawyer who wants to understand the political theory of Soviet Russia. The writer, formerly a Professor of Law in the University of Petrograd, writes as a lawyer, and presents the official theory, without either condemning it or advocating it.

In the Soviets the Rule of Law has been abandoned as matter of principle. The power of the governing class in Russia is not limited by law. *Ce qui distingue surtout l'État soviétique de l'État de droit, c'est que le droit comme tel n'y joue aucun rôle . . . rien, ni même son propre droit ne limite le pouvoir de l'État* (p. 131).

POST-WAR CONSTITUTIONS.²

A CONVENIENT collection of post-war constitutions in French not giving the constitutions of the old States unless since the war they have radically reformed their constitutions. The volume includes eighteen constitutional texts, and at the end is a short but useful bibliography.

It is introduced by an interesting essay of fifty-five pages in which M. Mirkine-Guetzevitch endeavours to show what are the tendencies common to these new constitutions. He sees in these texts a tendency to the *rationalisation du pouvoir*, and a confirmation of the principles of democracy. But he is not blind to the fact that things are not always what they seem, and that some States, *e.g.* Turkey and Russia, are very queer democracies in fact, whatever they may be in theory. And if Italy and Spain had come within his purview, the contention that democracy is gaining ground in Europe would be still more hazardous.

The work forms one of a series called *Bibliothèque d'Histoire et de Politique*, containing studies of various countries, which deserves to be better known in England.

PRIVATE INTERNATIONAL LAW.

THIS book³ contains an account of the history of what became at the Sixth Panamerican Conference the "Bustamante Code" of private international law, together with the discussions, text, etc. It was a

¹ *La Théorie Générale de l'État Soviétique*, by B. Mirkine-Guetzevitch. (Paris: Giard, 1928.) Pp. 203. Price 25 francs.

² *Les Constitutions de l'Europe Nouvelle*, by B. Mirkine-Guetzevitch. (Paris: Delagrave, 1928.) Pp. 412. Price 18 francs.

³ *Le Code de Droit international privé et la Sixième Conférence Panaméricaine*, par Antonio Sanchez de Bustamante y Sirven: traduit de l'espagnol par Paul Goulé. Librairie du Recueil Sirey, 22 rue Soufflot, Paris, 1929. Pp. 226.

gallant attempt to reconcile divergent systems of juridical thought and treatment, and, while almost necessarily failing in its high intent, will remain a great effort which may well become acceptable to all the Ibero-American Republics after some adjustments: for many States signed with reservations. The United States of America, representing almost alone the Anglo-Saxon ideas, could hardly accept the code as a whole, and in any case had to reserve the rights and jurisdiction of the forty-eight component States. It is not difficult to see defects in the text, but without intimate criticism little would be gained by pointing them out. It represents a noteworthy effort, and remains an important contribution to the future of private international law, and to the uniformity of law which, in many departments, should follow thereon.

WYNDHAM A. BEWES.

INTERNATIONAL CONFERENCES.¹

THIS book, brought out under the auspices of the Carnegie Endowment for International Peace, gives a good deal of information about international conferences and their machinery. It contains a good chapter on the League of Nations and its conferences, and chapters discussing the services which conferences are capable of rendering and the inevitable limitations of their usefulness. The Appendix gives lists of the principal international conferences from 1818 to 1928, some rules of procedure of international conferences, and a bibliography.

A COMPARATIVE STUDY OF MODERN LAWS.

THIS important work,² of which the first instalment was reviewed in this *Journal* in 1928,³ is making excellent progress.

The first two volumes are now complete. Volume I, which runs to a thousand large octavo pages in double-columns, is arranged according to countries.

It gives a broad description of the law of each country, dealing particularly with the sources and the judicial organization. Each article has a bibliography.

The first part of this volume, which was dealt with in our previous review, covers the European countries, the second part covers Asia, Africa, America (North and South), Australia and Oceania.

It is significant of the care with which the book is being edited that this volume concludes with about 70 pages of additions, mentioning alterations in the law and books which have appeared since the earlier

¹ *The Public International Conference*, by Norman L. Hill, Ph.D. (London: Mr. Humphrey Milford; Oxford University Press.) Pp. xi + 267. Price 13s. 6d. net.

² *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*. Herausgegeben von Dr. Franz Schlegelberger. (Vahlen, Berlin, 1929.)

³ Third Series, vol. x, pt. iv, p. 348.

part was printed. In Volume II, which is now complete, begins the account of the different laws under titles arranged alphabetically. It has now got down to *Einrede*. The names of the contributors are a guarantee that the work is being well done.

As suggested in the previous review, we hope that the book will give at the end a list of the titles of the articles with their equivalents in English and French. It is a book which is much needed, and we hope it will have the success which it deserves.

F. P. W.

BIBLIOGRAPHY OF FRENCH LAW.¹

WE have received the Supplement for 1928 of this work (reviewed in this *Journal*²) which is really invaluable for students of French law. Something like it for English law is badly wanted.

THE LEGAL SYSTEM OF ENGLAND.³

THIS is a wonderful sixpenn'orth of English law. It gives a sketch of the legal system clearly and firmly drawn, and is written in a bright and interesting manner.

We have to acknowledge :

The Extritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries. By E. R. Adair, M.A. (London : Longmans, Green & Co., Ltd.) Pp. xii + 282. Price 21s. net.

Principles of the Law of Corporations : With Special Reference to British India. By Satis Chandra Bagchi. Tagore Law Lectures—1914. Calcutta University. Pp. xvii + 631.

Les Choses Publiques en Droit Romain. By Nicolas Karadgé-Iskrow. (Paris : J. Peyronnet & Cie.) Pp. 116.

La Philosophie de l'Ordre Juridique Positif : spécialement dans les Rapports de Droit privé. By Jean Dabin. (Paris : Recueil Sirey.) Pp. viii + 791. Price frs. 65.

Crime and Punishment in Germany. By Theodor Hampe. Translated by Malcolm Letts. (London : Routledge.) Pp. viii + 175. Price 10s. 6d. net.

The Milligan Case. Edited, with an Introduction and Notes, by Samuel Klaus. (London : Routledge.) Pp. 476. Price 15s. net.

The Austinian Theories of Law and Sovereignty. By R. A. Eastwood and G. W. Keeton. (London : Methuen & Co., Ltd.) Pp. viii + 82. Price 3s. 6d.

¹ *Bibliographie Générale des Sciences Juridiques, Politiques, Économiques et Sociales de 1800 à 1928*, by A. Grandin. (Paris : Recueil Sirey, 1929.) Pp. 167.

² See *Journal of Comparative Legislation*, Third Series, vol. x, pt. iv, p. 344.

³ *The Legal System of England*, by J. E. G. de Montmorency. Benn's Sixpenny Library.

- Die Rechtsgrundlagen der internationalen Kartelle.* By Dr. Reinhold Wolff. (Berlin : Carl Heymanns Verlag.) Pp. xvi + 182. Price M. 12.
- The Civil Code of the Republic of China.* Book I—General Principles. Trans. by Ching-lin Hsia and James L. E. Chow. Pp. iii + 57.
- A History of the Constitution or Government of Trinidad.* By Charles Reis. Vol. I, 2nd ed. Pp. 291.
- Real Security against War.* By F. N. Keen. (London : Williams & Norgate, Ltd.) Pp. 32. Price 1s.
- Handbuch des Deutschen Staatsrechts.* By Gerhard Anschütz and Richard Thoma. Vol. I. Parts 1-9. (Tübingen : J. C. B. Mohr.)
- Transactions of the Grotius Society.* Vol. 14. (London : Sweet & Maxwell.) Pp. xxxiii + 174. Price 7s. 6d.
- Fifth Annual Report of the Permanent Court of International Justice.* Series E, No. 5. (Leyden : A. W. Sijthoff.) Pp. 497.
- The Molineux Case.* Ed., with an Introduction and Notes, by Samuel Klaus. (London : Routledge.) Pp. x + 409. Price 15s net.
- La Question des minorités à la Conférence de la Paix de 1919-1920 et l'action juive en faveur de la protection internationale des minorités.* By Nathan Feinburg. (Paris : Librairie Rousseau.) Pp. 167. Price 30 francs.
- Report of the Thirty-fifth Conference of the International Law Association.* (London : Sweet & Maxwell.) Pp. clxxviii + 487. Price £2 net.
- An Analysis of the 9th Edition of Taswell-Langmead's Constitutional History.* 5th ed. By A. M. Wilshere. (London : Sweet & Maxwell.) Pp. 133. Price 6s. 6d. net.

PERIODICALS RECEIVED.

American Journal of International Law.—Vol. 23, no. 3, July 1929.

BAXTER, J. P., Some British Opinions as to Neutral Rights, 1861-1865 ; ROUCEK, J. S., Procedure in Minorities Complaints ; LADAS, STEPHEN B., The Efforts for International Protection of Scientific Property ; WILLIAMS, PAUL W., Legitimate Targets in Aerial Bombardment ; DÉAK, FRANCIS, Immunity of a Foreign Mission's Premises from Local Jurisdiction.

Canadian Bar Review.—Vol. vii, no. 7, September 1929.

WEIR, J. A., Frustration of Adventure and Unjust Enrichment ; MACKENZIE, N. A., The Jay Treaty of 1794 ; DAVISON, J. F., The Study of Jurisprudence ; RIDDELL, W. R., Fi. Fa. Lands in Upper Canada.

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PATTERSON, EDWIN W., The Transfer of Insured Property in German and in American Law ; HOWARD, PENDLETON, Criminal Prosecution in England ; MATHEWS, ROBERT E., Pretermitted Heirs : An Analysis of Statutes.

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